(1)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON,

Petitioner,

v.

DEMOCRATIC PARTY OF WASHINGTON STATE; REPUBLICAN STATE COMMITTEE OF WASHINGTON; LIBERTARIAN PARTY OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General

James K. Pharris
Sr. Assistant Attorney General
Counsel of Record

Jeffrey T. Even
William G. Clark
Assistant Attorneys General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

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QUESTION PRESENTED

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court declared that California could not lawfully use a "blanket" primary to select the nominees of political parties for state and federal partisan political offices, without the consent of the parties, because doing so violated the rights of the political parties to freedom of association and freedom of expression in conducting party affairs. Since 1935, Washington has also used a "blanket" primary for partisan offices, but uses the primary to winnow the field of candidates for the general election, not to "nominate" party standard bearers for public office.

Does a blanket primary that winnows the field of candidates for partisan office in the general election—but does not nominate political party "standard bearers"—violate the First Amendment rights of association of political parties?

PARTIES

The parties to the proceeding below were:

Petitioner: Sam Reed, Secretary of State, State of Washington. Petitioner was aligned as Defendant-Appellee below.

Respondents: (1) The Democratic Party of Washington State and the following individuals who were or are officers and adherents of that Party: Paul Berendt, James Apa, Helen Carlstrom, Vivan Caver, Charlotte Coker, Edward Cote, Ted Highley, Sally Kapphahn, Karen Marchioro, David McDonald, Joseph Nilsson, David Peterson, Margarita Prentice, Karen Price, Marilyn Sayan, John Thompson, and Ya-Yue Van. These Respondents were aligned as Plaintiffs-Appellants below.

(2) The Republican State Committee of Washington and the following individuals who were or are officers and adherents of that Party: Jeff Kent, Lindsey Echelbarger, Chris Vance, Diane Tebelius, and Diane Ludlow. These respondents were aligned as Intervenors-Appellants below.

(3) The Libertarian Party of Washington and the following individuals who were or are officers and adherents of that Party: John Mills, Chris Caputo, Donald Crawford, and Erne Lewis. These Respondents were aligned as Intervenors-Appellants below.

(4) The Washington State Grange and two of its individual members: Terry Hunt and Jane Hodde. These Respondents were aligned as Intervenors-Appellees below.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Secretary of State Sam Reed, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 343 F.3d 1198. *Dem. Party Wash.*, App. at 1a. The Court of Appeals' order denying the petition for rehearing and for rehearing en banc is unpublished. App. at 26a. The opinion of the United States District Court for the Western District of Washington is also unpublished. App. at 29a.

JURISDICTION

The judgment of the Ninth Circuit was entered September 15, 2003. On October 23, 2003, the court of appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. App. at 26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Wash. Rev. Code § 29.18.010 provides:

"Candidates for the following offices shall be nominated at partisan primaries held pursuant to provisions of this chapter:

(1) Congressional offices;

(2) All state officers except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices where a county home rule charter provides otherwise." App. at 89a.

Wash. Rev. Code § 29.18.200 provides:

"Except as provided otherwise in chapter 29.19 RCW, all properly registered voters may vote for their choice at any primary held under this title, for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." App. at 92a.

Wash. Rev. Code § 29.30.095 provides:

"The name of a candidate for a partisan office for which a primary was conducted shall not be printed on the ballot for that office at the subsequent general election unless the candidate receives a number of votes equal to at least one percent of the total number cast for all candidates for that position sought and a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary." App. at 96a.

STATEMENT

This case concerns a challenge to the system used in the State of Washington to conduct primary elections. Washington has historically conducted primaries using a system that permits every voter to fully participate in the selection of their elected officials, commonly referred to as a "blanket primary". This case presents the question whether Washington's system is *per se* unconstitutional based upon this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (*Cal. Dem. Party*), or is distinguishable from the system considered in the California case, based on a deeper inquiry into the legal and political context in Washington.

1. History Of Washington's Blanket Primary

In 1935, Washington adopted a blanket primary system for filling federal, state, and local partisan elective offices.[1] Voters in the primary may vote for any candidate for each office on the ballot, regardless of the political affiliation of the candidate and without any declaration of political faith or party adherence on the part of the voter.[2] Wash. Rev. Code

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[1] The blanket primary was originally proposed as an initiative measure to the Legislature by the Washington State Grange in 1934 (Initiative Measure No. 2). Following article II, section 1(a) of the Washington Constitution, the Legislature adopted the initiative as a statute during the 1935 Session. 1935 Wash. Laws ch. 26 (Initiative Measure No. 2).

[2] Washington statutes contain no provision requiring or authorizing voters to affiliate or register as adherents to a political party or organization, with the sole exception that party declarations may be required for the purpose of partici-

§ 29.18.200, App. at 92a. To qualify to have their names printed on the general election ballot, candidates must (1) obtain at least one percent of the total votes cast for all candidates for the office in the primary, and (2) receive a plurality of the votes cast for candidates designating a particular political party. Wash. Rev. Code § 29.30.095, App. at 96a.[3] This election system allows Washington voters to winnow the field of candidates before the general election, while still assuring that general election voters will have a choice between candidates designating two or more political affiliations.

Washington's blanket primary was twice challenged in the state courts, and twice upheld. In *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936), the state supreme court rejected a challenge brought on a variety of grounds by the Democratic and Republican political parties. In *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980), the Democratic party and two of its officers again challenged the blanket primary, asserting that it infringed the political party's freedom of association. Again, the court upheld the blanket primary, which has now been in use in Washington for nearly seventy years.[4]

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pating in a party's presidential preference primary, when the party so requires. Wash. Rev. Code § 29.19.055, App. at 93a.

[3] Candidates filing for partisan elective office indicate their party designation on the filing papers. Wash. Rev. Code § 29.15.010(3), App. at 88a.

[4] In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), this Court upheld those aspects of Washington's election law relating to the way candidates of minor parties qualify for

In 1996, California adopted its own version of the blanket primary through an initiative measure. Four political parties sued to invalidate it. Eventually, this Court invalidated California's blanket primary in *Cal. Dem. Party.*, holding that California's election system forced the political parties to open up their party nomination processes to non-members of the parties (or members of rival parties) without their consent and in violation of their constitutional rights to free association and free expression.

2. Proceedings Below

Shortly after this Court issued its opinion in *Cal. Dem. Party*, the Washington State Democratic Party filed this action in the United States District Court for the Western District of Washington against the Washington State Secretary of State, the Washington State Attorney General, and local election officials, asserting that Washington's blanket primary was invalid for the reasons this Court applied to California. The state's other two major parties, the Republican and Libertarian parties, intervened as additional plaintiffs. The Washington State Grange and certain of its members intervened as additional defendants. The complaints sought both declaratory and injunctive relief.

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the ballot and noted in passing that Washington conducted a "blanket" primary. *Munro*, 479 U.S. at 192. Although the blanket primary context of Washington law was important in analyzing the rights of minor parties, the constitutionality of the blanket primary itself was not before the Court in *Munro*.

After preliminary proceedings not directly pertinent here, the parties filed cross-motions for summary judgment. The district court entered an order granting summary judgment to the defendants, on the alternative grounds that (1) Washington's election system is distinguishable from California's and (2) the plaintiff political parties had failed to meet their evidentiary burden of showing harm as the result of the conduct of Washington's blanket primary. App. at 42a-53a, 74a-82a.

3. The Ninth Circuit Appeal

The three political parties appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit. A three-judge panel reversed the district court. The panel concluded (without specific analysis on the point) that *Cal. Dem. Party* invalidated all blanket primaries, rejecting the notion that Washington's election system was distinguishable from California's. *Dem. Party Wash.*, App. at 13a. Having concluded that blanket primaries were invalid *per se*, the Ninth Circuit did not reach the evidentiary arguments presented. *Dem. Party Wash.*, App. at 24a. The decision remanded the case to the district court for entry of appropriate declaratory and injunctive relief. *Dem. Party Wash.*, App. at 25a.

The state defendants and the Grange both moved for rehearing and for rehearing en banc. These motions were denied by the Ninth Circuit October 23, 2003. App. at 26a.

REASONS FOR GRANTING THE PETITION

A lower federal court has struck down a long-standing state statute which has been upheld by the state's highest court on two different occasions. Furthermore, the lower court decision failed to analyze the whole context of Washington's election system in requiring the state to change the way it elects its officers and representatives. This context distinguishes Washington's blanket primary from the system held invalid in *Cal. Dem. Party*. Finally, this Court has been rightly generous with guidance to the states on questions concerning the right to vote, which sits at the very heart of our democratic system.

A. The Ninth Circuit Decision Conflicts With The Decisions Of Washington's State Supreme Court

Washington's blanket primary was upheld twice by the Washington Supreme Court. *Anderson v. Millikin,* 186 Wash. 602, 59 P.2d 295 (1936); *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980).[5] While the 1980 case was resolved primarily on the issue of the failure of the plaintiffs to demonstrate harm from the application of the blanket primary, the earlier 1936 case was a broad challenge based on a number of constitutional theories, including the asserted effect of the blanket

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[5] The Alaska Supreme Court also upheld the form of blanket primary used in that state for many years. *O'Callaghan v. Alaska*, 914 P.2d 1250 (Alaska 1996). *But see O'Callaghan v. Alaska*, 6 P.3d 728 (2000).

primary on political parties and their constitutional rights. The Washington Supreme Court rejected each of these challenges. In reliance on these decisions, three generations of Washington voters have used the blanket primary as a part of the process for choosing their elected officers. This fact alone sharply contrasts with California, which adopted the blanket primary only in 1996.

As noted earlier, Washington's blanket primary was before this Court as recently as 1986 in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), in which the issue before the Court was whether Washington's blanket primary system adequately provided minor parties with reasonable access to the ballot. Reversing the court of appeals, this Court upheld Washington law in that regard. Although the constitutionality of the blanket primary itself was not challenged in *Munro*, this decision upholding state law reinforced the state's confidence that its election system met constitutional standards.

In 2000, this Court invalidated California's use of a blanket primary in *Cal. Dem. Party*, but based on the way California election law is structured and the role assigned to parties in California state law—factors not present in Washington. Washington's primary was not before the Court in the California case, and this Court took some pains to say that its decision was based on the specific issues raised by California law. *See* discussion *Cal. Dem. Party*, 530 U.S. at 584.

B. The Ninth Circuit's Decision Invalidates Washington's Longstanding Election System Without Considering The Important Distinctions Between Washington And California Law

1. The California Primary At Issue In *Cal. Dem. Party*

As the opening language of the opinion shows, this Court invalidated California's blanket primary because it was used to select the nominees of the political parties for public office:

> "Under California law, a candidate for public office has two routes to gain access to the general ballot for most state and federal elective offices. *He may receive the nomination of a qualified political party by winning its primary, see* Cal. Elec. Code Ann. §§ 15451, 13105(a) (West 1996); or he may file as an independent by obtaining (for a statewide race) the signatures of one percent of the State's electorate or (for other races) the signatures of three percent of the voting population of the area represented by the office in contest, *see* § 8400." *Cal. Dem. Party*, 530 U.S. at 569-70 (emphasis added) (footnote omitted).

Thus, the opinion is premised from the beginning on the fact that in California, to gain access to the general election ballot, one must either be the *nominee of a political party* or must qualify as an independent candidate. Before 1996, California had conducted "closed" primaries in which the nominees of each party were selected by those voters who had

publicly registered their affiliation with that party. *Cal. Dem. Party*, 530 U.S. at 570. California's Proposition 198, without changing the party registration system or otherwise altering the fundamental nature of the election, opened up each party's nomination process to the participation of all voters. *Id.* Thus, the California initiative attempted to engraft a blanket primary on an election system that, in all other respects, remained a party nomination process. Thus, the effect of the California initiative was to open each party's separate nominating process to participation by (1) voters registered in other parties and (2) voters who were not registered as affiliating with any party.[6]

The California decision fully recognized the prerogatives of states to determine their own election systems. *Cal. Dem. Party*, 530 U.S. at 572 (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)). The Court recognized that states may use primaries or other preliminary elections to select nominees for office. *Id.* (citing *American Party of Texas v. White*, 415 U.S. 767, 781 (1974)). The Court recognized that a state may regulate the manner in which political parties gain places on the ballot. *Id.* (citing *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). Furthermore, while this Court found that California had failed to demonstrate a sufficient basis for using a blanket

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[6] In a footnote responding to the dissent, the *Cal. Dem. Party* majority opinion noted that elections were public affairs, but noted also that "when the election determines *a party's nominee* it is a party affair as well". *Cal. Dem. Party*, 530 U.S. at 573 n.4 (emphasis added).

primary, the Court recognized that at least some of the interests advanced by California might, under other circumstances, be sufficient to justify a state law. *Cal. Dem. Party*, 530 U.S. at 584.

2. Washington's Election Law As Distinguished From California's

Cal. Dem. Party left open the question whether a blanket primary could be used by a state which does not use the primary to select *party nominees* for elective office.[7] That is precisely the issue presented in the present challenge to Washington's blanket primary. Washington's election system uncouples the party organizations from the primary, without completely eliminating party affiliation as a factor in electing public officers. The most striking distinction between Washington and California is that Washington has never registered voters by party affiliation. Washington law simply takes no notice of an individual voter's party affiliation. Wash. Rev. Code § 29.07.070, App. at 85a. By contrast, California's voters are (and were throughout the time California used a blanket

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[7] Near the end of the majority opinion, the Court described a "nonpartisan primary" which, in the Court's opinion, would serve many of the interests asserted by California without burdening political party rights. In the system described, after qualified candidates competed in the primary, the top two vote getters (or however many the state might prescribe) would move on to the general election. As the Court observed: "This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee." *Cal. Dem. Party*, 530 U.S. at 585-86. Although Washington's primary is not identical to the one described, it shares with it the feature that primary voters are not choosing the parties' nominees.

primary) asked to affiliate with a political party as a part of their registration process, thus producing a list of the members of each party. Cal. Elec. Code § 2150, App. at 101a.[8]

Given California's party registration system, it was a simple matter to define the "membership" of each party as the set of voters registered as affiliated with that party. In such a system, the blanket primary introduced an anomalous element by opening each party's nomination process to the "members" of all the parties. This was the basis of this Court's judgment that California's blanket primary impaired the associational rights of the parties, which were otherwise defined *in California law itself* around the concept of party membership. In other words, California law simultaneously (1) defined party membership and made it an important factor in the election system, but (2) through the blanket primary, permitted the "members" as defined to participate in the nomination of candidates of other parties.

The same analysis cannot be applied to Washington, where there is no definition of party "membership". The voters in Washington do not participate in separate "party nomination" primaries, but in a single primary, open to all voters, whose purpose is not to designate party "nominees" or "standard bearers" but to winnow the field of candidates who will appear on the general election ballot. Washington law does not describe candidates

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[8] Citations to California statutes in this petition are to the form in which those statutes existed prior to this Court's decision in *Cal. Dem. Party*.

qualifying for the general election as party nominees. Wash. Rev. Code § 29.30.101, App. at 97a.[9] Candidates for both partisan and nonpartisan offices are called candidates seeking "nomination at a primary". Wash. Rev. Code § 29.30.101, App. at 97a.

Although Washington does not choose to operate party nominating systems for the political parties, political parties do play visible and important roles in the election system. First, the party affiliation *of the candidates* (based purely on self-designation, with no further test of party "membership") partially determines which candidates in the primary will advance to the general election. A candidate filing for partisan office indicates a party designation on the declaration of candidacy. Wash. Rev. Code § 29.15.010(3), App. at 88a. At the primary, every voter may vote for any candidate for each office, without regard to party designation. Wash. Rev. Code § 29.18.200, App. at 92a. To qualify for the general election ballot, a candidate must obtain at least one percent of the total votes cast for an office, as well as a plurality of the votes cast for all candidates for that office who have listed the same party designation. Wash. Rev. Code § 29.30.095, App. at 96a. This virtually assures that general election voters will have a choice not only between candidates as individuals but between

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[9] *Cf.* Cal. Elec. Code § 15451 (referring to a successful primary candidate as the "nominee of that party"), App. at 113a.

candidates who have a variety of party designations.[10]

Second, minor parties nominate candidates by convention before the primary is conducted.[11] Wash. Rev. Code § 29.24.020, App. at 94a. Independent candidates qualify for the ballot in the same way. Wash. Rev. Code § 29.24.020, App. at 94a. After being nominated by convention, minor party candidates receive certificates of nomination and are placed on the primary ballot, along with candidates designating major party affiliation. Wash. Rev. Code § 29.24.070, App. at 96a. In that sense, a minor party candidate is also the "nominee" of the party. The basis for this distinction is that minor parties, already having weak ballot strength, are allowed to designate a single "standard bearer" to appear on the primary ballot.[12]

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[10] Thus, Washington voters may have the opportunity to choose, at the general election, among a self-designated Republican, a self-designated Democrat, and an independent candidate. This does not render the candidates "nominees" of their respective parties—they may or may not enjoy the support of the party organizations—but is designed to give the voters a choice among candidates designating different parties.

[11] If a candidate designating a party receives at least five percent of the total vote cast for president, vice president, United States Senator, or a statewide office at a general election held in an even-numbered year, that party qualifies as a "major" political party. Wash. Rev. Code § 29.01.090, App. at 85a. All other organizations fielding candidates are "minor" political parties. Wash. Rev. Code § 29.01.100, App. at 85a.

[12] Major parties may lawfully endorse particular candidates in the primary. They may not, however, lawfully keep non-endorsed candidates from filing for office, nor may they interfere with the blanket primary as the determining

Third, Washington law gives political party organizations a limited role in filling vacancies on the ballot. *See* Wash. Rev. Code § 29.18.150, App. at 89a (party may certify a candidate if no one designating that party files for a partisan office); Wash. Rev. Code § 29.18.160, App. at 90a (party may fill vacancy caused if a candidate for partisan office dies or is disqualified after the filing period but before the election). In either of those cases, the purpose of state law is not to transform the primary into a party nominating process, but to preserve, to the greatest extent practical, the choice voters will have in the upcoming election.

Washington law seeks to afford the state's voters maximum participation at each stage of the election process without completely foregoing the advantages of interparty competition. The primary is not conducted by, for, or through the political parties, but by and for the general electorate. Within this system, political party organizations are fully free to perform all the functions performed in any jurisdiction, including the freedom to endorse and support favored candidates. Above all, Washington is not a state in which one qualifies for the general election ballot by becoming the "nominee of a political party". Thus, the *Cal. Dem. Party* analysis may not be mechanically applied to a state that employs the blanket primary in a wholly distinct way from California's.

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factor on which candidate advances to the general election. Washington's distinct treatment of minor parties was upheld by this Court in *Munro* as having a rational basis and as advancing legitimate public policies. *Munro*, 479 U.S. at 195-99.

3. The Ninth Circuit Opinion

Although the *Cal. Dem. Party* decision clearly holds open the possibility that a blanket primary may be permissible in some circumstances not present in the California case, the Ninth Circuit in this case proceeds from the proposition that *Cal. Dem. Party* invalidates the use of the blanket primary under any circumstances. From the observation that Washington and California have both operated "blanket" primaries, the Court of Appeals jumps to the conclusion that the "Washington scheme is materially indistinguishable from the California scheme". *Dem. Party Wash.*, App. at 13a; *see also* 13a-15a. The Ninth Circuit opinion attempts no analysis of the important distinctions between the roles played by parties and party affiliation in the two states, nor does it grapple, even briefly, with the notion that the associational rights of a party with a membership defined in state law may vary considerably from those of a party in a state which takes no official notice of party membership.

An analysis of Washington's election system, unlike California's, cannot proceed from the premise that a party's "membership" is legally entitled to use the state primary to nominate its candidates for partisan elective office. In contrast to California, Washington fully honors the private status of the political parties, by making their "endorsement" or "nomination" of candidates an entirely private process, neither regulated nor recognized by state election law. Washington's system invites the next question: whether Washington's law, by giving party affiliation some role to play in determining access by

candidates to the general election ballot, invokes the same panoply of party associational rights that this court recognized in *Cal. Dem. Party*. This issue is worth careful analysis, and Washington stands ready to show how its blanket primary operates consistently with the full exercise by all political parties of their constitutional rights. The Ninth Circuit opinion, however, merely assumes the problem away and spends most of its analysis on ancillary issues.[13]

Furthermore, the Ninth Circuit opinion appears to expand the associational rights of parties considerably beyond those set forth by this Court in *Cal. Dem. Party*. In the California case, this Court found that where a state uses a party nomination process to select candidates, it must give due deference to the associational rights of the parties. *See* discussion *Cal. Dem. Party*, 530 U. S. at 573-74 (constitution reserves special protection for process by which a political party selects a standard bearer). In failing to analyze how the *Cal. Dem. Party* principles apply in a state which does not use its law to chose "party standard bearers", the Ninth Circuit appears to conclude that the constitution affords parties the unlimited right to choose their nominees for public office and require states to recognize these nominations by placing them on the general election

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[13] The Ninth Circuit spends about half of its opinion analyzing whether Washington showed sufficient state interest to justify the "burden" placed on the political parties by Washington's election laws. *Dem. Party Wash.*, App. at 18a-24a. Washington's principal argument is that the state imposes no burden on party constitutional rights which would require the showing of a "compelling interest".

ballot. *Dem. Party Wash.*, 15a-16a ("Party adherents are entitled to associate to choose their party's nominees for public office.").[14] Because there is no supporting analysis, the Ninth Circuit opinion can be read to say either that (1) Washington's law amounts to the choosing of party "standard bearers" because of the statutory provision limiting the general election ballot to only one candidate per party designation for each office, or (2) as soon as an office is defined as "partisan", parties have a right to control how their candidates for that office will be nominated, or even (3) parties have a constitutional right to nominate candidates for any office, partisan or not.[15]

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[14] Washington expects the respondent political parties to argue, based on the Ninth Circuit decision, and to some extent on *Tashjian*, that exercise of their constitutional rights of association entitles each political party to require the state to conduct a party primary, or to honor nominations made by caucus or convention, or some combination of the above, as each party may determine (or redetermine) from time, notwithstanding the choices made by other parties or the election policies of the state Legislature. In other words, they envision the state as a sort of electoral "short order cook" implementing each party's choice of a preferred nomination system, even if this means operating a "closed" primary for one party, an "open" primary for a second, and a "nomination by convention" for a third. It is not even clear that they would concede that a state could escape this role by redefining offices as nonpartisan.

[15] Even assuming Washington's current law is constitutionally defective, the Ninth Circuit opinion casts a shadow of uncertainty over the state's legislative options in choosing an election system to replace the current blanket primary. Without knowing precisely why the current law is defective, the state Legislature is hampered in crafting a solution to resolve the constitutional issues.

Washington has operated for nearly seven decades with an election system that decouples the notion of "party nomination" from the process of qualifying candidates for the general election. Washington fully honors the rights of the political parties as private organizations to associate with one another, endorse, support, and campaign for favored candidates for office.[16] Washington does not, however, yield to private organizations the decision who will appear on the state's election ballot, assigning that role to the general electorate, and is aware of no authority holding that a state is constitutionally compelled to do so.

In *Cal. Dem. Party*, this Court found that the election laws of another state, California, violated the constitutional rights of political parties and could not be enforced. Neither Washington's statutes nor the reasoning of the Washington Supreme Court were before the Court for review. The Ninth Circuit brushed aside the state court cases as simply irrelevant in light of *Cal. Dem. Party. Dem Party Wash.*, 10a-11a[17]. Washington's popular and long-established system, the survivor of multiple litigation challenges in the past, deserves better than

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[16] In that sense, parties are perfectly free to "nominate" candidates for public office. They must use the state's election system, however, to qualify their candidates for the ballot.

[17] The Ninth Circuit was responding to an argument made by intervenor Washington State Grange that the Washington cases have *res judicata* effect, at least as to the Republican and Democratic parties in Washington. The state is not here asserting that the Washington cases bar the parties from relitigating the issue, but does assert that the Washington Supreme Court decision is entitled to considerable deference.

the cursory treatment afforded by the Ninth Circuit opinion. In *Cal Dem. Party,* this Court took pains to recognize the fundamental role of the states in deciding how to conduct their elections. *Cal. Dem. Party*, 530 U.S. at 572. Following that line of reasoning, this Court should carefully weigh the nature of Washington's election system in light of the parties' claims and should come to the same conclusion reached by the state court: that the blanket primary *as used in Washington* leaves political parties vigorous and free to exercise their constitutional rights while opening all stages of the election process to full participation by all interested voters.

C. The States And The People Need The Guidance Of This Court On A Fundamental Issue Involving The Right To Vote

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).[18] This case involves the fundamental issue of voting rights from three separate points of view: (1) the rights of individual voters to participate in various stages of the election process which will choose their officers and representatives; (2) the rights of voters to aggregate into political parties and to participate as parties in the election process; and (3) the authority

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[18] *See also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

of sovereign states, acting through their legislative bodies, to determine how to order the election process. In this case, Washington has devised an election system that maximizes the electoral franchise and grants state voters broad participation in the nomination process as well as in the general election. The political parties assert that this attempt to further the interests of the voters *as individuals* results in unconstitutional impairment of the rights of voters *as aggregated into political parties*. The answer to the question will determine how the election process itself will operate, and thus will "set the rules" for the functioning of state government as well as for the choice of the state's representatives in Congress.

Ordinarily, this Court grants writs of certiorari in cases where there is a conflict between the circuits at the appellate level in the federal courts, or a conflict between a federal court of appeals and a state court of last resort. *See* Rule 10. Cases involving voting and elections have, wisely, been one of the areas of the law in which this Court relaxes these standards at times to clarify fundamental issues which are at the "heart of democracy". The following are examples of cases in which this Court granted review in cases involving elections without requiring a conflict in the decisions of other courts:

a. In *Rice v. Cayetano*, 528 U.S. 495 (2000), this Court considered the constitutionality of a Hawaii law restricting the franchise in the election of trustees of the Office of Hawaiian Affairs, a state agency, to native Hawaiians. Since no other state has a

similar law, there was no conflict among circuits on this precise issue.

b. In *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), this Court considered challenges to a Virginia law permitting a political party to charge candidates a registration fee to participate in the party's nominating process. Again, Virginia appears to be the only state with such a provision.

c. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), this Court granted review of an Arkansas law purporting to impose term limits on certain state and federal offices. Although there were term limits cases pending in more than one circuit, the Court did not wait for a conflict to develop, but granted petitions "[b]ecause of the importance of the issues". *U.S. Term Limits*, 514 U.S. at 786.

d. In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), this Court reviewed a Connecticut law which limited participation in the party primary to registered party adherents, even though one political party sought to open its nomination process to independent voters. Although a number of states had similar provisions, the Court did not wait for a conflict in lower court decisions to develop.

Since Washington is the only state continuing to use the blanket primary, it is unlikely that a conflict will ever develop among the circuits on the proper interpretation of this Court's *Cal. Dem. Party*

decision or the general issue of the constitutionality of blanket primaries.[19] Yet, as in the other cases cited, this case involves fundamental issues at the heart of the democratic process: whether there are any circumstances in which states may permit voters to participate broadly in nominations for partisan offices, whether a state may use party affiliation as a factor in deciding which candidates will be on the general election ballot without yielding control of the nomination process to the political parties, and whether political parties are entitled to commandeer the state election machinery to implement their privately chosen party nomination choices.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

RESPECTFULLY SUBMITTED.

CHRISTINE O. GREGOIRE
Attorney General

James K. Pharris
Sr. Assistant Attorney General
Counsel of Record

Jeffrey T. Even
William G. Clark
Assistant Attorneys General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

November 25, 2003

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[19] As discussed below, the Ninth Circuit's decision does conflict with earlier decisions by the Washington Supreme Court.

APPENDIX

Democratic Party of Washington State v. Reed, 343 F.3d 1198 (9th Cir. 2003) 1a

Order, Ninth Circuit, Oct. 23, 2003 (denying rehearing and rehearing en banc) 26a

Order, U.S.D.C. W.D. Wash., Mar. 27, 2002 (re summary judgment) 29a

Washington Statues 85a

California Election Statutes (in effect at the time of the *Cal. Dem. Party* decision) 100a

United States Court of Appeals,
Ninth Circuit.

DEMOCRATIC PARTY OF WASHINGTON STATE; Paul Berendt; James Apa; Helen Carlstrom; Vivian Caver; Charlotte Coker; Edward Cote; Ted Highley; Sally Kapphahn; Karen Marchioro; David Mcdonald, Joseph Nilsson; David Peterson; Margarita Prentice; Karen Price; Marilyn Sayan; John Thompson; Ya-Yue Van,

Plaintiffs-Appellants,

Washington State Grange; Terry Hunt; Jane Hodde,

Intervenors-Appellees,

and

Republican State Committee of Washington, Jeff Kent; Lindsey Echelbarger; Libertarian Party of Washington; Washington State Grange; Terry Hunt; Jane Hodde; Christopher Vance; Dione Ludlow; John Mills; Freedom Socialist Party; Green Party of Washington; Chris Caputo; Donald Crawford; Erne Lewis,

Intervenor,

v.

Sam REED, Secretary of State of the State of Washington,

Defendant-Appellee.

Democratic Party of Washington State;
Paul Berendt; James Apa; Helen Carlstrom;
Vivian Caver; Charlotte Coker; Edward Cote;
Ted Highley; Sally Kapphahn; Karen Marchioro;
David Mcdonald, Joseph Nilsson; David Peterson;
Margarita Prentice; Karen Price; Marilyn Sayan;
John Thompson; Ya-Yue Van,

Plaintiffs,

Jeff Kent, Libertarian Party of Washington;
Washington State Grange; Terry Hunt;
Jane Hodde; Dione Ludlow; John Mills; Freedom
Socialist Party; Green Party of Washington;
Chris Caputo; Donald Crawford; Erne Lewis,

Intervenor,

and

Republican State Committee of Washington,
Jeff Kent; Lindsey Echelbarger; Libertarian Party of
Washington; Washington State Grange;
Terry Hunt; Jane Hodde; Christopher Vance;
Dione Ludlow; John Mills; Freedom Socialist Party;
Green Party of Washington; Chris Caputo;
Donald Crawford; Erne Lewis; Christopher Vance;
Lindsey Echelbarger; Diane Tebelius,

Intervenors-Appellants,

Washington State Grange; Terry Hunt;
Jane Hodde,

Intervenors-Appellees,

v.

Sam Reed, Secretary of State of the State of Washington,

Defendant-Appellee.

Democratic Party of Washington State; Paul Berendt; James Apa; Helen Carlstrom; Vivian Caver; Charlotte Coker; Edward Cote; Ted Highley; Sally Kapphahn; Karen Marchioro; David Mcdonald, Joseph Nilsson; David Peterson; Margarita Prentice; Karen Price; Marilyn Sayan; John Thompson; Ya-Yue Van,

Plaintiffs,

Christopher Vance; Republican State Committee of Washington, Jeff Kent; Lindsey Echelbarger; Dione Ludlow; Freedom Socialist Party; Green Party of Washington; Diane Tebelius,

Intervenors,

and

Libertarian Party of Washington State; John Mills; Chris Caputo; Donald Crawford; Erne Lewis,

Intervenors-Appellants,

Washington State Grange; Terry Hunt;
Jane Hodde,

Intervenors-Appellees,

v.

Sam Reed, Secretary of State of the State of
Washington,

Defendant-Appellee.

Nos. 02-35422, 02-35424, 02-35428.

Argued and Submitted Feb. 6, 2003.
Filed Sept. 15, 2003.

Political parties brought action challenging Washington's "blanket primary" system, in which voters chose candidates without being restricted to candidates of any particular party, as unconstitutional. On cross-motions for summary judgment, the United States District Court for the Western District of Washington, Franklin D. Burgess, J., granted state's motion, and political parties appealed. The Court of Appeals, Kleinfeld, Circuit Judge, held that Washington's blanket primary system violated political parties' First Amendment right of free association.

Reversed and remanded.

David T. McDonald (argued and briefed), James A. Goeke (briefed), Jonathan H. Harrison (briefed), Preston, Gates & Ellis, LLP, Seattle, WA,

for appellants Democratic Party of Washington State, et al.

John J. White Jr., (argued and briefed) and Kevin B. Hansen (briefed), Livengood, Fitzgerald & Alskog, PLLC, Kirkland, WA, for appellants Republican State Committee of Washington, et al.

Richard Shepard, Shepard Law Office, Tacoma, WA, for appellants Libertarian Party of Washington State, et al.

James K. Pharris (argued and briefed), Senior Assistant Attorney General, Olympia, WA, and Jeffrey T. Even (briefed), Assistant Attorney General, Olympia, WA, for appellee Sam Reed.

James M. Johnson, Olympia, WA, for appellees Washington State Grange, et al.

Appeal from the United States District Court for the Western District of Washington; Franklin D. Burgess, District Judge, Presiding. D.C. No. CV-00-05419-FDB.

Before KLEINFELD, and McKEOWN, Circuit Judges, and BREYER,* District Judge.

* The Honorable Charles R. Breyer, District Judge for the Northern District of California, sitting by designation.

KLEINFELD Circuit Judge.

The State of Washington conducts a "blanket" primary, in which voters choose candidates without being restricted to candidates of any particular party. The Democratic, Republican and Libertarian Parties all challenged the law, claiming that it unconstitutionally restrains their supporters' freedom of association. They are correct.

We recognize that Washington voters are long accustomed to a blanket primary and acknowledge that this form of primary has gained a certain popularity among many of the voters. Nonetheless, these reasons cannot withstand the constitutional challenge presented here. The legal landscape has changed, and our decision is compelled by the Supreme Court's landmark decision in *California Democratic Party v. Jones.*[1]

I. BACKGROUND

Washington's "blanket primary" system was first established in 1935. Except for presidential primaries, "all properly registered voters may vote

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[1] 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000).

for their choice at any primary . . ., for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter."[2] All the candidates from all parties are listed on the ballot, along with a party designation or "independent" designation.[3] To get onto the general election ballot, a candidate has to get a plurality of the votes cast for candidates of his or her party, and at least one percent of the total votes cast at the primary for all candidates for that office.[4]

Thus the voter gets a ballot listing all candidates of all parties and votes freely among them, as opposed to getting an exclusively Democratic or Republican or other limited ballot. And the voter can choose candidates from some parties for some positions, others for other positions, a process known as "ticket-splitting."[5]

Presidential primaries are different. If a

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[2] Wash. Rev. Code § 29.18.200.

[3] Wash. Rev. Code § 29.30.020(3).

[4] Wash. Rev. Code § 29.30.095.

[5] Wash. Rev. Code § 29.18.200.

major party so requests, voters requesting a party-specific ballot get a separate ballot listing candidates only of that party.[6] Nonaffiliated voters get ballots listing candidates of all parties.[7] These different kinds of ballots have to be "readily distinguishable," the results reported separately, and a major party can allocate delegates using the partisan ballots under its own rules.[8]

In the case before us, the Democratic Party of Washington sued the Secretary of State for a declaratory judgment that the blanket primary was unconstitutional and an injunction enabling the Party to "limit participation" in partisan primaries. The Republican Party successfully moved to intervene as a plaintiff, seeking similar declaratory relief and an injunction likewise requiring the Secretary of State to implement a mechanism to "effectuate the Party's exercise of its right to limit participation in that primary." Numerous individuals joined both complaints as plaintiffs. The Libertarian

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[6] Wash. Rev. Code § 29.19.045.

[7] *Id.*

[8] Wash. Rev. Code § 29.19.055.

Party also intervened, likewise seeking a declaratory judgment of unconstitutionality, and an injunction with terms focusing upon its interests as a small party. The Washington State Grange intervened as a defendant, supporting the blanket primary system as is.

Pursuant to stipulation, the 2000 primary was held under the existing statutory system. Though a preliminary injunction would have limited subsequent primaries in accord with the parties' complaint, the district court dissolved the injunction on July 24, 2001. The case then went forward on cross motions for summary judgment. The district court granted the State of Washington's motions to strike the declarations of witnesses put forward by the Democrats and Republicans, and denied the political parties' motions for summary judgment on the ground that they had not demonstrated evidence of a substantial burden to their First Amendment right of association. The district court granted the defendants' motion for summary judgment on the ground that the political parties had failed to meet their burden of proof. The political parties now

appeal both the evidentiary rulings and the grant of summary judgment.

II. ANALYSIS

We review de novo the district court's grant of summary judgment.[9]

A. Res Judicata

The Grange argues that we should affirm the judgment on the ground that the constitutional issues are res judicata. The Washington State Supreme Court upheld the blanket primary against challenges by individuals in 1936[10] and 1980.[11] The district court rejected this argument, and so do we. Obviously, res judicata does not apply because none of the plaintiffs were parties or in privity with parties to those cases, and constitutional law has changed materially since then,[12] most notably for

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[9] *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

[10] *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295, 296-97 (1936).

[11] *Heavey v. Chapman*, 93 Wash. 2d 700, 611 P.2d 1256, 1259 (1980).

[12] *Montana v. United States*, 440 U.S. 147, 161-62, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979) (past judgments need not be given preclusive effect if there has been a significant intervening change of law). *See also Kennedy v. City of Seattle*, 94 Wash. 2d 376, 617 P.2d 713, 715-16 (1980) (issues may be of

purposes of this case when *Democratic Party v. Jones* came down in 2000.

B. Strict Scrutiny

The complexity of the relationship among private, state, and federal regulations of state elections has grown through a long series of decisions beginning with those rejecting the white-only Democratic primaries in the South,[13] continuing through to the present day in *Bush v. Gore.*[14] Fortunately, it is no longer necessary to parse this entire body of law, because the Supreme Court

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sufficient public importance to bar the use of collateral estoppel).

[13] *See, e.g., Nixon v. Herndon,* 273 U.S. 536, 47 S. Ct. 446, 71 L. Ed. 759 (1927); *Nixon v. Condon,* 286 U.S. 73, 52 S. Ct. 484, 76 L. Ed. 984 (1932); *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944); *Terry v. Adams,* 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953). Subsequently, constitutional law as applied to primary elections has developed significantly with respect to the state's relationship to political parties outside of the racial context as well. *See, e.g., Rosario v. Rockefeller,* 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973); *American Party of Texas v. White,* 415 U.S. 767, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974); *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981); *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986); *Eu v. San Francisco Democratic Comm.,* 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989); *Burdick v. Takushi,* 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

[14] 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000).

recently spoke to the precise problem at issue in this case. *California Democratic Party v. Jones*[15] held unconstitutional a California blanket primary scheme. The case at bar turns on whether the Washington scheme is distinguishable from the California scheme held in *Jones* to violate the right of free association.

The Secretary of State argues that the district court properly excluded the Democratic and Republican Parties' evidence, and without it, the Parties fail to meet what the Secretary claims is their burden of proof to show that they are harmed.

It is not at all clear that the plaintiffs had any "burden of proof" that they needed to bear. There is no standing or case or controversy issue. This is a facial challenge to a statute burdening the exercise of a First Amendment right. The challenge is brought by those wishing to exercise their rights without the restraints imposed by the statute. In *Jones,* the Court read the state blanket primary statutes, determined that on their face they restrict free

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[15] 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000).

association, accordingly subjected them to strict scrutiny, and only then looked at the evidence to determine whether the state satisfied its burden of showing narrow tailoring toward a compelling state interest. The Supreme Court does not set out an analytic scheme whereby the political parties submitted evidence establishing that they were burdened. Instead, *Jones* infers the burden from the face of the blanket primary statutes. We accordingly follow the same analytic approach as *Jones*.

The Washington scheme is materially indistinguishable from the California scheme held to violate the constitutional right of free association in *Jones*. They are both "blanket" primaries. *Jones* carefully distinguishes blanket primaries, in which a voter can vote for candidates of any party on the same ballot, from an "open" primary where the voter can choose the ballot of either party but then is limited to the candidates on that party's ballot.[16] Obviously the blanket primary is also different from a "closed" primary in which only voters who register as members of a party may vote in primaries to

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[16] *See id.* at 576, n. 6, 120 S. Ct. 2402.

select that party's candidates.[17] *Jones* also distinguishes the "*nonpartisan* blanket primary" in which voters can vote for anyone on the primary ballot, and then the top vote-getters regardless of party run against each other in the general election.[18]

The Washington statutory framework is a straight blanket primary, not an open, closed or nonpartisan blanket primary. Washington argues that its scheme should be distinguished from California's on two grounds. First, California registers voters by party but Washington does not. Second, as the State's brief puts it, because of its non-partisan registration, the winners of the primary "are the 'nominees' not of the parties but of the electorate."[19] Thus, the State argues, its primary is a "*nonpartisan* blanket primary"[20] that under *Jones* does not violate the parties' associational rights.

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[17] *See id.* at 570, 120 S. Ct. 2402.

[18] *Id.* at 585-86, 120 S. Ct. 2402.

[19] Brief of Appellee Sam S. Reed at 46.

[20] *Jones*, 530 U.S. at 585, 120 S. Ct. 2402 (emphasis in original).

These are distinctions without a difference. That the voters do not reveal their party preferences at a government registration desk does not mean that they do not have them. The Washington scheme denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party.

Also, those who actively participate in partisan activities, including activities such as holding precinct caucuses in their homes, serving on local and state party committees, contributing money to their parties, canvassing, and watching polls for their parties, have a First Amendment right to further their party's program for what they see as good governance. Their right to freely associate for this purpose is thwarted because the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees. The right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapes. Party adherents are entitled to associate to choose their party's

nominees for public office. As for the State of Washington's argument that the party nominees chosen at blanket primaries "are the 'nominees' not of the parties but of the electorate,"[21] that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees.

The First Amendment protects the right of freedom of association with respect to political parties,[22] and this right includes "the right not to associate."[23] "In no area is the political association's right to exclude more important than in the process of selecting its nominee."[24] The nominee is "the party's ambassador to the general electorate in winning it over to the party's views,"[25] and the blanket primary "forces petitioners to adulterate their candidate-selection process--the 'basic function of a political party'--by opening it up to persons

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[21] Brief of Appellee Sam S. Reed at 46.

[22] *Jones*, 530 U.S. at 574, 120 S. Ct. 2402 (quoting *Tashjian*, 479 U.S. at 214-15, 107 S. Ct. 544).

[23] *Id.* at 574, 120 S. Ct. 2402.

[24] *Id.* at 575, 120 S. Ct. 2402.

[25] *Id.*

wholly unaffiliated with the party."[26] Even "a single election in which the party nominee is selected by nonparty members could be enough to destroy the party,"[27] as would have been the case had opponents been able to swamp the Republican Party in 1860 and force it to nominate a proslavery candidate rather than Abraham Lincoln.[28] "Unsurprisingly, [the Supreme Court's] cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences."[29]

Thus under *Jones* the Washington blanket primary system is materially indistinguishable from the California blanket primary system and is unconstitutional unless the defendants bear their burden of demonstrating that "it is narrowly tailored

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[26] *Id.* at 581, 120 S. Ct. 2402 (internal citation omitted).

[27] *Id.* at 579, 120 S. Ct. 2402.

[28] *Id.* (citing 1 Political Parties & Elections in the United States: An Encyclopedia 398-408, 587 (L. Maisel ed. 1991)).

[29] *Id.* at 575, 120 S. Ct. 2402 (internal citations and quotation marks omitted).

to serve a compelling state interest."[30]

C. State Interests

In *Jones,* the State of California put forth seven different state interests that it claimed could justify the use of a blanket primary. The Court rejected all of them as less than compelling.[31] The defendants in this case assert some of the same interests that the Court categorically rejected. This "determination is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant."[32]

Defendants argue that (1) the blanket primary "promotes fundamental fairness because it permits all voters, regardless of party affiliation, to

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[30] *Id.* at 582, 120 S. Ct. 2402.

[31] *Jones,* 530 U.S. at 584, 120 S. Ct. 2402 ("Respondents' remaining four asserted state interests--promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy--are not, like the others, automatically out of the running; but neither are they, *in the circumstances of this case,* compelling.") (emphasis in original).

[32] *Id.* (emphasis in original).

participate in all stages";[33] (2) "all the voters should help choose the nominees for all offices" to provide maximum choice;[34] and (3) the blanket primary affords voters "full participation in the election process without forcing them to publicly reveal their political party affiliation."[35] The first two amount to the same interest California urged in *Jones,* categorically rejected because "a nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications."[36] Providing increased "voter choice" "is hardly a compelling state interest, if indeed it is even a legitimate one."[37] The supposed unfairness of depriving those voters who do not choose to affiliate with a party from picking its nominee "seems to us less unfair than permitting nonparty members to

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[33] Brief of Appellee Sam S. Reed at 50.

[34] *Id.*

[35] *Id.* at 52.

[36] *Jones,* 530 U.S. at 583, 120 S. Ct. 2402 (quoting *Tashjian,* 479 U.S. at 215-16 n. 6, 107 S. Ct. 544) (citations and quotation marks omitted).

[37] *Id.* at 584, 120 S. Ct. 2402.

hijack the party."[38]

The third proposed interest--privacy--has to be rejected as well. In *Jones,* the Supreme Court held that "we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a 'compelling' one."[39] Washington law expressly requires the State to provide the parties, upon request, with the partisan affiliations expressed by voters in the presidential primary.[40] It is only in general elections that the Washington Constitution broadly protects voters' secrecy as to their partisan preferences. Primaries are distinguishable, under the Washington Constitution, because "[i]t is not the purpose of the primary election law to elect officers."[41]

Washington also argues that its blanket primaries promote "increased voter participation by giving all voters the sense that their votes 'count' in

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[38] *Id.*

[39] *Id.* at 585, 120 S. Ct. 2402.

[40] Wash. Rev. Code § 29.19.055.

[41] *State ex rel. Zent v. Nichols,* 50 Wash. 508, 97 P. 728, 731 (1908). *See* Wash. Const. art. VI, § 8 (". . . the elections for such state officers shall be held in every fourth year . . . on the Tuesday succeeding the first Monday in November.").

every stage of the election process."[42] *Jones* rejects the voter participation argument on the ground that it is "just a variation on the same theme (more choices favored by the majority will produce more voters) and suffers from the same defect" as the State's arguments that "fairness" requires that unaffiliated voters participate in the primary elections.[43] The State's argument that it has a compelling interest in preserving its sovereign "right to determine how public officers will be chosen" is insufficiently specific to function as a compelling state interest. While of course a State may impose time, place, and manner restrictions on a primary election,[44] those restrictions may not infringe on Constitutional rights, as the blanket primary system imposed by the State of Washington does.

There is one more argument that the State makes, which is in substance the same one the Grange makes. As the State puts it, the blanket primary "recognizes the associational interests of

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[42] Brief of Appellee Sam S. Reed at 51.

[43] *Jones*, 530 U.S. at 584-85, 120 S. Ct. 2402.

groups other than political parties" by enabling voters to "form ad hoc political associations which cross party lines to support a particular candidate or a particular cause."[45] The Grange argues that Grange members support water and public utilities for farms and that its members' rights to advance their rural agenda in both parties will suffer if each Granger is forced to choose a party ballot.[46] The Grange says that it spearheaded the initiative in 1933 that led Washington to adopt the blanket primary, which has successfully prevented "a politically corrupt nominating process controlled by political bosses or special interests."[47]

"Special interests" are evidently in the eye of the beholder. Some urban voters might think that special protection for rural water and electricity concerns serve a "special interest" of farmers, and that the Grange is a special interest group. There is

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[44] U.S. Const. Art. I, § 4, cl. 1. *See also Burdick*, 504 U.S. at 433, 112 S. Ct. 2059.

[45] Brief of Appellee Sam S. Reed at 52.

[46] Brief of Appellee-Intervenor Washington State Grange at 25.

[47] *Id.*

nothing corrupt about promoting such protection, nor is there anything corrupt about organizing a party agenda that does not provide special protection for these interests. The members of the Grange have a First Amendment right to control its membership and message so that it is not swamped by new members with some urban or foreign policy agenda. Likewise, the people in the Democratic, Republican, and Libertarian Parties have First Amendment rights to control their nominating processes so that they are not controlled by Grangers.

This special interest argument is materially indistinguishable from the first one the Court rejected in *Jones*. California had urged that the blanket primary produced nominees "who better represent the electorate" and go beyond "partisan concerns," because blanket primaries "compel candidates to appeal to a larger segment of the electorate."[48] The Court analogized this to requiring the South Boston Allied War Veterans Council to allow "an organization of openly gay, lesbian and bisexual persons" to march in their St. Patrick's Day

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[48] *Jones*, 530 U.S. at 582, 120 S. Ct. 2402.

Parade,[49] and, like that, the object of the California blanket primary was to require speakers to substitute someone else's message for their own, which "the general rule of speaker's autonomy forbids."[50] The remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates carrying a message adverse to their interests is to vote for someone else, not to control whom the party's adherents select to carry their message.

Appellants also challenge the district court's evidentiary rulings, which struck much of the evidence they submitted. We need not reach the evidentiary questions, because even without the evidence, appellants are entitled to prevail. This case presents a facial constitutional challenge, and the Washington blanket primary statute is on its face an unconstitutional burden on the rights of free association of the Democrats, Republicans and Libertarians who have brought this suit.

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[49] *Id.* at 582-83, 120 S. Ct. 2402.

[50] *Id.* at 583, 120 S. Ct. 2402.

We REVERSE and REMAND for entry of summary judgment, declaratory judgment, and an injunction in favor of the appellants.

FILED

OCT 23 2003

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMOCRATIC PARTY OF WASHINGTON STATE, et al.,

Plaintiffs - Appellants,

WASHINGTON STATE GRANGE, et al.,

Intervenors - Appellees,

and,

REPUBLICAN STATE COMMITTEE OF WASHINGTON, JEFF KENT, et al.,

Intervenor,

v.

SAM REED, as Secretary of State of the State of Washington,

Defendant-Appellee.

No. 02-35422

D.C. No. CV-00-5419-FDB
Western District of Washington, Tacoma

ORDER

DEMOCRATIC PARTY OF WASHINGTON STATE, et al.,

Plaintiffs,

JEFF KENT, LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Intervenor, and,

REPUBLICAN STATE COMMITTEE OF WASHINGTON, JEFF KENT, et al.,

Intervenors - Appellants,

WASHINGTON STATE GRANGE, et al.,

Intervenors - Appellees,

v.

SAM REED, as Secretary of State of the State of Washington,

Defendant - Appellee.

No. 02-35422

D.C. No. CV-00-5419-FDB
Western District of Washington, Tacoma

DEMOCRATIC PARTY OF WASHINGTON STATE, et al.,

Plaintiffs,

CHRISTOPHER VANCE, et al.,

Intervenors,

and,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Intervenors - Appellants,

WASHINGTON STATE GRANGE, et al.,

Intervenors - Appellees,

v.

SAM REED, as Secretary of State of the State of Washington,

Defendant - Appellee.

BEFORE: KLEINFELD and McKEOWN, Circuit Judges, and BREYER*, District Judge.

The panel has voted unanimously to deny defendant-appellee's petition for rehearing and intervenors-appellee's petition for rehearing. Judges Kleinfeld and McKeown have voted to deny defendant-appellee's petition for rehearing en banc and intervenors-appellees' petition for rehearing en banc, and Judge Breyer has recommended the same.

The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing and petitions for rehearing en banc are DENIED.

* The Honorable Charles R. Breyer, District Judge for the Northern District of California, sitting by designation.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA[1]

DEMOCRATIC PARTY WASHINGTON STATE, *et al.*,

Plaintiffs,

v.

SAM REED, as Secretary of State of the State of Washington, *et al.*,

Defendants.

REPUBLICAN STATE COMMITTEE OF WASHINGTON, *et al.*,

Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, *et al.*,

Intervenors,

WASHINGTON STATE GRANGE, *et al.*,

Intervenors.

Case No. C00-5419FDB

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and DENYING PLAINTIFFS DEMOCRATS' and INTERVENORS REPUBLICANS' MOTIONS FOR SUMMARY JUDGMENT

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[1] Grammatical, punctuation, and/or spelling errors in the original order have been retained. The pages in the table of contents have been altered to reflect the proper pages in the smaller United States Supreme Court booklet format.

WASHINGTON STATE DEMOCRATIC PARTY V. REED, et al. No. C00-5419FDB

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INTRODUCTION

This matter is before the Court on cross-motions for summary judgment filed by Plaintiffs, Washington State Democratic Party, *et al.* (hereafter Democratic Party); Defendants Sam S. Reed, as Secretary of State, *et al.* (hereafter Reed, Secretary of State, State, or Defendants); and Intervenors Republican Party of The State Of Washington, *et al.* (hereafter Republican Party).

Intervenors Libertarian Party of Washington State, *et al.* (hereafter Libertarian Party) and Intervenors Washington State Grange, *et al.* (hereafter The Grange) have filed responsive memoranda, as have the other parties to each of the summary judgment motions. The motions are ready for the Court's consideration.

Defendant Reed has filed three motions to strike certain declarations submitted by the Democratic and Republican parties, and these, too, are at issue and ready for the Court's consideration.

On March 8, 2002, the Court held oral argument on the summary judgment motions. The Plaintiffs, Defendants, and Intervenors participated

in oral argument, and they presented their views and responded to questions from the Bench. The Grange submitted a document, marked in evidence, that further supported its case. While the Grange said that it could submit further evidence should the Court hold a full trial, it admitted that such evidence would merely reinforce what it has already presented. The other parties were in agreement that this matter is ready for the Court's decision on the cross motions for summary judgment.

The Democratic Party seeks a declaratory judgment that Washington State's blanket primary election system is unconstitutional because it imposes a severe burden on the First Amendment rights of the Party and its members and because the primary system either does not advance a compelling state interest or, to the extent that it does, there are other, less burdensome alternatives to advance those interests. The Democratic Party contends that the votes of those affiliated with the Party are substantially diluted by the votes of those who refuse to affiliate with the Party, or who are openly affiliated with the Republican party. As a result,

contends the Democratic Party, election outcomes are altered, and the Democratic candidates who survive the blanket primary do not address Democratic issues in government to the extent that they would if they had to achieve re-nomination in a process in which Democratic votes were not diluted by the votes of non-Democrats.

The Republican Party argues that this case presents a straightforward issue of the application of clear U. S. Supreme Court precedent to uncontested material facts. The Republican Party states that the essential, uncontested facts are that Washington's blanket primary forces the Republican Party to have its standard-bearers in the general election chosen not only by Republicans, but also by Democrats, independent voters, and third party voters, thus altering the message of Republican candidates. The Republican Party argues that this adulteration of the Republican Party's message and candidate selection process, alone, is sufficient for the blanket primary to be an unconstitutional invasion of First Amendment rights.

Defendant Secretary of State Reed argues that the Constitution does not vest political parties with the right to dictate the manner in which the voters select candidates for public office, and that voters in Washington do not participate in the primary as party members or affiliates, but as the general electorate winnowing the field and choosing nominees to qualify for the general election ballot. Furthermore, Secretary of State Reed argues that the evidence submitted by the political parties is insufficient to satisfy their burden of showing that Washington's election system is unconstitutional.

The Grange Intervenors oppose the summary judgment motions of the political parties arguing that the political parties have failed in their proof and that they likewise lose a test balancing the arguable impacts on the political parties' associational right with the legitimate, compelling interests protected and advanced by Washington's unique election system. The Grange argues that their First Amendment rights as a non-partisan association advance their political interests best in

this system allowing them to vote for candidates from either party.

The Libertarian Party opposes Defendant Secretary of State Reed's motion for summary judgment arguing that because it is smaller than the two major parties, its ability to preserve its core political values and advanced its political message is at greater risk. The Libertarian Party had a right to nominate its own candidates until the 2000 election, but now as a fledgling major party, it has not been shown that it has the ballot strength to preserve the integrity of its message or to withstand the dilution of its ballot strength by multiple persons filing as Libertarian candidates who may not be affiliated with or sympathetic to the goals and messages of the party. Furthermore, the Libertarian Party argues that it does not need opinion testimony to demonstrate harm, that the harm, or risk of harm is obvious.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the moving party establishes that there are no genuine issues of material fact and it is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). Summary judgment is proper if a defendant shows that there is no evidence supporting an element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Failure of proof as to any essential element of plaintiff's claims means that no genuine issue of material fact can exist and summary judgment is mandated. *Celotex*, 477 U.S. 317, 322-23 (1986). The nonmoving party "must do more than show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The substantive law governs whether or not a fact is material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Inferences drawn from the facts are viewed in favor of the non-moving party. *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630-31 (9th Cir. 1987). All reasonable

doubts as to the existence of a material fact are resolved against the moving party. *Id.* at 631. Summary judgment is not appropriate if the credibility of witnesses is at issue. *Securities and Exchange Comm. V. Koracorp Industries, Inc.*, 575 F.2d 692, 699 (9th Cir.), *cert denied*, 512 U.S. 1236 (1994).

The party alleging the unconstitutionality of a statute has the burden of proof. A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509, U.S. 312, 320 (1993), citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

III. DISCUSSION

A. LEGAL BACKGROUND

The issue before the Court is whether Washington's blanket primary is unconstitutional in view of the Supreme Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). That case addressed the issue of whether California's primary system unconstitutionally burdened the

political parties' First Amendment right of association. This right of association, derived from freedom of speech and assembly, was clearly announced in *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958): "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.." The Supreme Court held in *California Democratic Party*:

> In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process – the "basic function of a political party," *ibid.* – by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome – indeed, in this case the *intended* outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitu-tional unless it is narrowly tailored to serve a compelling state interest.

530 U.S. at 581-82. The Supreme Court then turned to the seven state interests claimed to be compelling.

The Supreme Court found two of the asserted interests – producing elected officials who better

represent the electorate and expanding candidate debate beyond the scope of partisan concerns – to be no more than circumlocutions for producing nominees and nominee positions other than those the parties would choose. The third interest – ensuring that disenfranchised persons enjoy the right to an effective vote – was seen as being merely a recharacterization of the nonparty members' keen desire to participate in selection of the party's nominee as "disenfranchisement" if that desire is not fulfilled. The Court said that the "disenfranchised" voter was actually a voter who was not a member of the majority party in a "safe" district. The four remaining interests – promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy – "are not, like the others, automatically out of the running; but neither are they *in the circumstances of this case*, compelling." 530 U.S. 584 (emphasis in the original). The Court said that the determination of whether these asserted state interests are compelling

> . . . is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking

> whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant.

530 U.S. at 584 (emphasis in original).

The Court then found all four of the asserted state interests not to be compelling. The Court saw the fairness issue as relating to the perceived inequity of nonparty members in "safe" districts not being allowed to determine the party nominee; the Court saw that "inequity" as less unfair, if it was unfair at all, than "permitting nonparty members to hijack the party." *Id.* The matter of affording voters greater choice failed because "it is obvious that the net effect of this scheme – indeed, its avowed purpose – is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." *Id.* (emphasis in original). This resulted in the range of choices favored by the majority of voters being increased. The interest of increasing voter participation was a variation on the greater choice theme and suffered from the same defect, in the Court's view. Finally, the Supreme Court did not think that the privacy interest, the confidentiality of one's party affiliation, could be considered in all

cases to be a "compelling" one, reasoning that "[I]f such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices." *Id.* at 585. In conclusion, the Supreme Court said that even if all four interests were compelling, Proposition 198 was not a narrowly tailored means of furthering them.

The Court then went into a description of a type of primary that would protect these interests, a *nonpartisan* blanket primary. Under such a primary, the state determines the qualifications required for a candidate to have a place on the primary ballot – nomination by established parties, voter-petition requirements for independent parties – then each voter, regardless of party affiliation, may vote for either candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. In the Court's view, this system

> "has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket

> primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness" – all without severely burdening a political party's First Amendment right of association."

Id. at 585-86.

B. WASHINGTON'S PRIMARY

In analyzing whether Washington's primary election system impermissibly burdens political parties' associational rights, it is important to understand Washington's primary system as compared with that of California against the background of the Supreme Court's reasoning. Washington's historical perspective is relevant as well when analyzing Washington's primary, because the State's interests in this blanket primary are animated by the electorate's evident desires over a long period of time.

The United States Constitution leaves it to the states to regulate elections. The Elections Clause of the United States Constitution, Art. I, § 4, cl. 1, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature

thereof." The states also have broad control over the election process for state offices. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 , 217 (1986). Nevertheless, this "state action" in regulating elections must be informed by other Constitutional provisions such as those contained in the First and Fourteenth Amendments.

California Democratic Party described the California system. In California, a candidate for public office gains access to the general election ballot by winning a political party's primary or by filing as an independent and receiving a certain percentage of votes. Party membership is defined through public registration. Until 1996, California held "closed" partisan primaries, in which only persons who were members of the political party – those who declared their affiliation when they registered to vote – could vote on the party's nominee. In 1996, via Proposition 198, California changed its closed primary to a blanket primary. After 1996's Proposition 198, each voter, rather than receiving a ballot with candidates of his own declared party, received a ballot that listed every candidate

regardless of party affiliation and allowed the voter to choose freely among them. It remained the case that the partisan candidate receiving the greatest number of votes is the nominee of that party at the ensuing general election.

In Washington, there is no provision for registering voters by party affiliation. (*RCW 29.07.070 Voter qualification information – Verification notice*) A candidate who desires to have his or her name printed on the ballot for election to office other than president or vice president of the United States must file a declaration and affidavit of candidacy, and among other things, shall indicate a party designation, if applicable. (*RCW 29.15.010 Declaration and affidavit of candidacy*) A candidate for a partisan office qualifies for having his name on the general election ballot if that candidate receives at the primary election at least one percent of the total number of votes cast for all candidates for that position and a plurality of the votes cast for the candidates of his or her party for that office. (*RCW 29.30.095, Partisan candidates qualified for general election*)

Political parties are much more in the forefront under California's election law. For example, in Washington, while a candidate for office indicates, if applicable, a party designation, in California, a candidate must present a declaration of candidacy, which will not be filed unless the candidate shows in his affidavit of registration that he has been continuously registered as being affiliated with the political party the nomination of which he seeks for at least three months immediately prior. (Cal. Elect. Code § 8001) An elections official attaches a certificate to the candidate's declaration showing the date on which the candidate registered his or her affiliation with the political party the nomination of which is sought, and indicating, furthermore, that the candidate has not been affiliated with any other qualified political party for the three-month period specified. *Id.* Thus, California election law provided that at the primary, a candidate had to pass some muster in demonstrating that he or she was among the party faithful. Then, until 1996, the voters who had declared in their registration forms that they were

affiliated with a particular political party (Cal. Elect. Code § 2150) would receive a ballot consisting only of candidates of that political party, and they would then vote for their choice. The candidate who received the highest number of votes for each office would become the nominee of that party in the ensuing general election. Thus, for the ensuing general election, Democrats chose their standard bearers for each office and Republicans chose their standard bearers.

Then an initiative statute was adopted following the voters' March 1996 adoption of Proposition 198. The initiative backers promoted the blanket primary largely as a measure that would "weaken" party "hard-liners" and ease the way for "moderate problem-solvers." *See California Democratic Party*, 530 U.S. at 570. Thereafter, all persons entitled to vote, including those not affiliated with any political party, were allowed to vote for any candidate regardless of the candidate's political affiliation. The result was that known, registered Democrats and known, registered Republicans were allowed to vote for any Republican or Democrat or

other candidate. The partisan candidate receiving the most votes at the primary became the nominee of that political party at the ensuing general election regardless of the party affiliation of voters who voted for that candidate.

In Washington, unlike California, a candidate for a partisan office need not first pass muster with a political party to which he chooses to align; the candidates simply self-declare their affiliation. Voters are not required to declare openly affiliation with one party or another in order to vote. This system is like the nonpartisan blanket primary described by the majority in *California Democratic Party*, except that rather than the top two (or other number) of vote getters moving on to the general election, Washington election laws allow those candidates receiving at least 1% of the total votes cast for all candidates for that position and a plurality of the votes cast for the candidates of his or her party for that office to advance to the general election ballot.

Two provisions of the Washington Constitution are relevant to the overall

circumstances: (1) All qualified voters are entitled to vote at all elections. Wash. Const. Art. VI, § 1. (2) "All elections shall be by ballot. The Legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and deposing his ballot." Wash. Const. Art. VI, § 6.

The Grange Intervenors provided some historical information. Importantly, and distinct from California, Washington has never required voters to register by political party. The Washington Legislature passed a law in 1922 that would have required all voters to register by political party, but a constitutional referendum was immediately filed, and Referendum Measure 14 (1922) overwhelmingly – 2.5:1 against – rejected the law providing for party resignation. The Washington Legislature also tried to adopt a system of "party primaries," including a loyalty oath requirement and giving political parties access to a list of voters participating in their primary. Again, a referendum petition was filed, and at the ensuing election, Referendum 15 (1922) was adopted and the "party primary" and list law was rejected by more than 2.5:1.

In 1933, the Grange, with support from other associations, circulated for voter signatures and qualified the "blanket primary" initiative. In 1934, the Legislature voted to enact the initiative and adopted the blanket primary system. (Washington's Initiative No. 2 and 1935 Lash. Law. Ch. 26) The Washington blanket primary statute having been enacted by the State Legislature, does not suffer from the same infirmity – being enacted by popular initiative alone – that concerned the dissent in *California Democratic Party*, 530 U.S. at 602-03.

Since the Washington Legislature adopted the blanket primary, there have been legal challenges to the system and a jurisprudential history has developed that further elucidates the background circumstances in Washington. *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936) upheld the constitutionality of Washington's blanket primary. *Anderson* held that as to the general objection that the law tends to destroy political parties, there is no concern of political parties in the constitution; the people in adopting both the state and federal constitutions went no further than to protect the

elector in his right to cast a ballot; not a coerced party ballot, but for the candidate of his choice, whether he be upon one ballot or another. "Finding no guaranty, express or implied, in favor of either a candidate or a party in the constitution, it follows that he or his party can claim no greater rights than the voter himself. The fountain cannot rise higher than its source." 186 Wash. at 606. The *Anderson* court also addressed an associational rights issue with an interesting point of view. The Court said that as to the argument that without the party test, those votes so inclined may elect Democrats as Republican precinct committeemen and vice versa,

> . . . [i]t is not to be presumed that any voter will abandon his right to participate in the selection of the committeeman of his own party in order to foist an unwanted individual upon a party to which he is opposed. But whether so or not, the provisions now under consideration apply equally to all parties who may be affected thereby, and thus there is no discrimination in favor of or against any.

Id. at 607-08.

Next, there was *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980), which presented the question of whether the blanket primary

(RCW 29.18.100 and those statutes implementing it RCW 29.30.010, .030) unconstitutionally restrict the plaintiffs' right of association under the state and federal constitutions. A unanimous Washington State Supreme Court held that they do not. The *Heavey* Court asked whether the Plaintiffs (a political party and two of its members) have shown a substantial burden and answered:

> Not only have they not shown a substantial burden, but they concede they cannot do so. Plaintiffs seek to avoid establishing a substantial burden by asserting the court places a "burden of negative proof" on them to which they cannot respond because voter ballots are made secret by another separate state action, the secret ballot. Plaintiffs suggest we abandon the substantial burden test and instead adopt what they term the "modified review standard."

93 Wn.2d at 702-03. The Court declined to adopt the modified review standard and said that "we believe the failure of plaintiffs even to attempt to show a substantial burden to their right of association is dispositive of the case." *Id.* at 703. The Court stated: ". . . at the very least those who would overturn statutes on constitutional grounds should

offer some evidence they have been harmed. Mere assertions of injury do not make for the violation of constitutional rights." Finally, the Court held that even though the case failed for failure to demonstrate a substantial burden to their association rights, there were certain compelling state interests that support a blanket primary: allowing each voter to keep party identification secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary. The Court saw the purpose of the statute stated in RCW 29.18.200 to allow:

> All properly registered voters [to] vote for their choice at any primary election, for any candidate for each office regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter.

Id. at 705. This purpose contrasts sharply with that of California's Proposition 198, which was, the Supreme Court observed: "Promoted largely as a measure that would 'weaken' party 'hard-liners' and ease the way for 'moderate problems solvers'." *California Democratic Party*, 530 U.S. at 570. The

Court concluded that the correction of any defects should be left to the legislature or popular initiative. *Id.*

The question is, under these circumstances, does Washington's primary system impermissibly burden the associational rights of the political parties.

C. EVIDENCE ON ISSUE OF BURDEN ON RIGHT OF ASSOCIATION

The political parties must demonstrate to the Court that Washington's primary election laws place a substantial burden upon their First Amendment right of association. *See American Party v. White*, 415 U.S. 767 (1974); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988). Whether a burden on a party's associational rights is substantial is a question of law. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 109 S. Ct. 1013, 1018-21 (1989).

The Democratic Party describes its view of the burden placed on political parties by Washington's blanket primary; it claims that the system forces the Party to adulterate its candidate selection process, to have its message changed, and potentially to have

the outcome of its primaries altered, and that this burden is the heaviest imaginable. This is, essentially, the burden described by the Republican Party, as well. The Libertarian Party sees the same burdens upon it now that it has moved from minor party to major party status, but sees these burdens as rendering even greater dangers because the Party is yet small.

Through various witnesses, the political parties assert evidence of a substantial burden on their associational rights. The State and the Grange submit evidence on their behalf as well. Some of the expert testimony submitted is the subject of motions to strike on a variety of bases.

1. Expert Testimony—Michael Snyder, Todd Donovan, Ph.D. and David J. Olson, Ph.D.

In support of their contentions of a substantial burden on their associational rights, the Democratic and Republican Parties rely on testimony of Michael Snyder, whom they present as their expert, as well as the testimony of other individuals.

The State and the Grange rely on the testimony of Professor Todd Donovan and Professor David J. Olson.

The State and the Grange challenge the testimony of Michael Snyder on two bases: (1) he lacks the professional qualifications to give expert testimony, and (2) his report fails to satisfy at least two parts of the three-part test set forth in Fed. R. Evid. 702 for expert witnesses. Each of these challenges will be discussed in turn.

a. The Experts' Qualifications

Mr. Snyder summarized his education and professional experience in his curriculum vitae. He has a Bachelor of Arts in history and did some post-graduate study of Eastern European history, but did not receive a post-graduate degree. (Snyder Dep. p. 6) He testified at his deposition that he sat in on some political science classes, although he doesn't have any direct recollection of it. (*Id.* p. 7) He stated that he took one class in statistics. (*Id.* p. 6) His work experience includes work on two political campaigns for two different candidates in the Midwest and for the Washington State Democratic

Campaign and Caucus as a "Phone Bank Director" involving volunteer callers in one case and paid callers in another wherein he wrote "scripts," trained the callers, did polling, and "voter i.d." He describes his work for the Washington Democratic Campaign and Caucus in September 1990 to April 1991 as involving legislative analysis and constituent relations. He also worked for a Washington consulting company with clients nationwide, where he did a variety of things including copy writing, speech writing, and "targeting," that is, analyzing election data, voter registration, election results. He is currently an independent consultant in Washington doing strategic planning and election analysis, research, and writing.

Defendant Secretary of State Reed and the Grange argue that Mr. Snyder does not have the requisite professional qualifications to give expert testimony; that Michael Snyder may have experience as a campaign consultant, but that he does not have the broad analytical background he would need to express opinions on such a broad topic as the effect of the blanket primary on political parties.

It is true that Michael Snyder lacks training in political science or in statistics, relevant study areas to address the issues in this case. Short of concluding that Mr. Snyder is unqualified as an expert in this case, the best that can be said is that he lacks the experience, the educational stature, and credentials to be authoritative in his opinions.

In contrast, Todd Donovan, Ph.D. (hereafter Dr. or Professor Donovan), is a professor of political science at Western Washington University, and his teaching areas are American politics, state and local politics; parties, campaigns and elections; comparative electoral systems; research methods and statistics (introductory level). His research areas are electoral systems and representation, political behavior, sub-national politics, direct democracy, political economy of local development. He is widely published, with books, book chapters, edited volumes, and articles in academic journals to his credit. Dr. Donovan's credentials render him an authoritative expert in this case. While the Democratic Party argues that Dr. Donovan's report ought to be excluded because it was late,

nevertheless, the delay did not cause harm to the political parties who were able to take his deposition on November 7 and they questioned him about all aspects of his report. Dr. Donovan is qualified as an expert and his report will not be excluded.

David J. Olson, Ph.D.(hereafter Dr. or Professor Olson) is presently a Professor in the Political Science Department at the University of Washington. As reflected in his Curriculum Vitae, he has a large number of books and articles to his credit, he reviews manuscripts for a variety of journals and agencies, he regularly gives speeches, and he has been active as a consultant since 1980. Dr. Olson is certainly qualified as an expert to testify on the matters at issue in this case.

b. Expert Opinion – Federal Evidence Rule 702

Secretary of State Reed and the Grange contend that Mr. Snyder's report fails most of the five factors of the test from *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)(one of three cases that prompted the revision of Fed. R. Evid. 702 into its present form); they also contend that

Mr. Snyder's report fails at least two parts of the three-part test of Fed. R. Evid. 702. Federal Evidence Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Daubert set forth a list of non-exclusive factors to be considered in evaluating scientific expert testimony: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review or publication; (3) the known or potential rate of error of the theory or technique when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or method has been generally accepted in the scientific community. *Daubert*, 509 U.S. at 593-94. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) clarified *Daubert* to include the

Court's "gatekeeper" role the screening of all proposed experts and their work, not just those advancing scientific opinions. In *General Electric Co. v. Joiner*, 522 U.S. 136, 146-47 (1997), the Court confirmed that challenges to the admissibility of expert opinions do not present issues of fact that would preclude summary judgment. The Court stated:

> Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

General Electric, at 146, 118 S. Ct. 512, 519.

The political parties asked Mr. Snyder to determine "To what extent did nonmembers of the Democratic Party participate in contested Washington primaries in September 2000? To what extent did nonmembers of the Republican Party participate in contested Republican primaries in December 2000?" (Snyder Dep. pp. 18 and 19) The political parties gave Mr. Snyder a definition of what

constituted party membership: "Members of the Democratic Party are defined as registered voters who participated in the February 2000 Washington presidential preference primary, and were issued a Democratic ballot," and they described members of the Republican Party similarly, referring to the February 2000 presidential preference primary. (Snyder Dep. at 19) Voters who were issued an unaffiliated ballot at the preference primary were not considered to be members of either the Democratic or Republican party. *Id.*

In the Plaintiffs' disclosures of expert testimony, Mr. Snyder's testimony is summarized: By comparing the ballot issuance records between the February 2000 presidential preference primary to the total votes recorded in a party's September 2000 primary, it is possible to determine whether more voters were allowed to participate in the party's primary than were known to be supporters of the party. In Mr. Snyder's "Preliminary Report Washington 2000 Blanket Primary Vote Analysis," he concludes that non-party voters – those who did not case that party's preference ballot in the 2000

presidential primary—participated in the 2000 Democratic and Republican blanket primary nominations process, often, at all levels of government, and in some cases, such participation was decisive. *Id.* at 16. Further, Mr. Snyder concluded that Democrats and Republicans participated in each other's primary. *Id.*

Mr. Snyder's evidence does not pass the first and second tests of Fed. R. Evid. 702. Mr. Snyder did not make a determination of party membership based on an analysis of relevant data; he merely accepted a definition from the political parties. Then, he reached his conclusions by simply performing mathematical computations. Dr. Donovan pointed to two key flaws in Mr. Snyder's analysis: (1) he used an untenable definition of "member" of the Democratic and Republican Parties by assuming that the only voters who can be regarded as members of the parties are those voters who participated in the February 2000 Washington presidential preference primary and were issued ballots affiliated with those parties; and (2) he used data from the February 2000 presidential

preference primary to make estimates of "non-party members" voting in the September 2000 state primary election. Dr. Olson's Statement discussed the issue of political party membership:

> In Washington, voters are not required to indicate party affiliation, adherence to a political party, or even party preference when registering to vote. As a matter of state statutory law, there is no legal basis for determining party membership in Washington State. And, under Washington's blanket primary system, which opens participation in selecting nominees for partisan offices to all registered voters, regardless of party preference, adherence or affiliation, there is no legal or organizational basis for determining party membership.
>
> In the absence of legal requirements to declare party affiliation when registering to vote, or requirements for paying dues to a party, or formally joining a party by signature, or making a public declaration of party adherence, there is no easy or clear way to define membership in political parties in Washington State. Instead, party affiliation in Washington is a psychological state of either identifying or not identifying with one or another of the major or minor political parties.

Statement of David J. Olson, Professor of Political Science, University of Washington, p. 4.

The Republican Party protests the idea that the definition of a political party should be left to a political scientist rather than to the political party itself. Similarly, the Democratic Party argues that

> [t]he State's preference that the Democratic Party organize itself in some other fashion or use some other eligibility requirement is not a basis for disregarding Mr. Snyder's testimony. The determination of how to structure the Party and who is eligible to participate in the Party's candidate selection process belongs to the Party, not the State or it academic experts.

Dem. Party Opp. Memo. at 18. This argument ignores the inherent problem with the political parties' definition of party membership in Washington.

In his declaration, Professor Donovan explained that the 2000 presidential preference primary presented a very biased picture of how voters are affiliated with parties in Washington. (Donovan Decl. at 4-6) For example, and among other things, the primary was weakly contested, as Vice President Gore had already locked up the Democratic nomination before the Washington primary, so there was little incentive for Democrats

to turn out. Thus, there would be a substantial under-estimate of the proportion of voters affiliated with the Democrats, and a biased estimate of Republican affiliates would also be produced. *Id.* Professor Donovan also goes on to state that the definition used in the Snyder report would never pass peer review in an academic journal, and that he knew of no study that has ever used this method. (Donovan Decl. ¶ 16) In his deposition, Professor Donovan testified that his definitions of party affiliation are used commonly in academic journals. (Donovan Dep. at 134; and see Prof. Donovan's "Report on the Consequences of Washington's Blanket Primary" at 1).

Besides using a nonstandard definition of party membership, Professor Donovan cited Mr. Snyder's use of noncomparable data – that is, that something that happened in February would be a measure of the partisan affiliations of voters in September – as another aspect of his report that would not pass peer review. (Donovan Dep. at 135) Professor Donovan was asked whether what Mr. Snyder did wasn't the same as what happened in

California – where "they simply counted the votes and analyzed the data based on the registration that was shown on the ballot?" (*Id.* at 210) Dr. Donovan explained that "the act of registering, I would assume, is not biased by a particular election in a particular year, whereas the way that Snyder has done his, who is likely to sign in as a Democrat or Republican in that example is biased by that particular election context." (*Id.* at 211)

Before one can gauge the impact of a primary election system upon a party's associational rights, one must identify political party members. This identification was easily done in California where voters must register their party affiliation, but the same is not true in Washington. The problem of identifying party members in Washington precludes a determination that those outside the party dilute the votes of those within the party. Professor Olson was questioned on this point in his deposition, and his answer highlights the problem:

> Q. Am I correct that you're unable to tell me whether, in this state, the vote of members of the Democratic Party in the Selection of their nominees – you're unable to

tell me whether that vote is diluted by the presence or potential presence of independents and Republicans in that process?

A. And the vote that's being diluted is the party members?

Q. Yes.

A. I don't know what "party members" means in the context of this question.

Olson Dep. at 45.

Mr. Snyder's Report is not based upon sufficient facts or data, and the testimony is not the product of reliable principles and methods. Mr. Snyder's mathematical calculations may be correct, but the serious flaws in his work, as discussed above and elaborated more fully in the reports and testimony of Professors Olson and Donovan, undermine it so as to render it worthless. Mr. Snyder's testimony must be excluded.

It is uncontested that Professors Olson and Donovan have submitted evidence in compliance with Fed. R. Evid. 702.

2. Other Testimony

The testimony of the Democratic Party's witnesses – Paul Berent, Blair Butterworth, and Don McConough – and the exhibits submitted with their

declarations; the testimony of the Republican Party's witnesses – Christopher Vance, Dale Foreman, John Meyers, and Thomas Lowry – and the exhibits submitted with their declarations, are the subject of motions to strike made by the Secretary of State. The State argues that this testimony must be excluded because it includes opinions, and these witnesses were not designated as experts, nor were the required disclosures made pursuant to Fed. R. Civ. P. 26(b)(4) and Local CR 26(a)(2); their testimony is thus rendered inadmissible under Fed. R. Evid 702. Moreover, their opinions and conclusions are not supported by detailed supporting data. The State also argues that these witnesses may not give opinions based on "scientific, technical, or other specialized knowledge" as lay witnesses under Fed. R. Evid. 701. Finally, the State argues that the opinions lack foundation, appear to be based upon hearsay. in part, or are simple conclusions, or are speculative. Regarding Thomas Lowry's testimony, the State argues that his description of his candidacy and the reasons for it are irrelevant.

The Democratic Party argues that their witnesses were available for deposition, they were disclosed as experts, citing that they may produce evidence under Fed. R. Evid 702, 703, or 705, and that they were not required to produce the additional disclosure that is required by Fed. R. Civ. P. 26(a)(2)(B) because these witnesses were not "retained" or "specially employed" to provide expert testimony. The Republican Party makes a similar argument.

a. Expert Opinion – FRE 702 and Fed. R. Civ. P. 26(a)(2)(B)

The point of Fed. R. Civ. P. 26(a)(2)(B)'s requirement of a written report for testifying expert witnesses is to provide more substantive information as an aid in preparation to depose the expert. This requirement does not turn on whether the witness is paid a fee. "Rule 26 focuses not on the status of the witness but rather on the substance of the testimony." *Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F. Supp. 1566, 1573 (N.D. Ill. 1996). The political parties' arguments on Rule 26's requirements are not well taken.

The declarations of the above-referenced witnesses include opinions that the outcomes of elections have been changed because the votes of "true believers" were diluted by the votes of non-party members, that the parties' political message is altered or adulterated by the blanket primary, that candidates elected under the blanket primary are "philosophically different," that the blanket primary increases the cost of primary election campaigns, and that the blanket primary "disillusions" party regulars and decreases their commitment to party activities. (See State's Response at 9 and citations to declarations therein) Much of the substance of these witnesses' testimony was addressed in the expert testimony of Professors Donovan and Olson, who are qualified to give such opinions, and the basis for their opinions is also known. The above-listed witnesses predicate their opinions on technical or other specialized knowledge that they have gained throughout the course of their service in the political parties' hierarchies or their careers as political consultants. The Court must carefully scrutinize testimony based on such experience:

> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. *The trial courts' gate keep function requires more than taking the experts' word for it.*

KW Plastics v. Untied States Can Co., 131 F. Supp. 2d 1289, 1292 (M.D. Ala. 2001)(emphasis in original). The political parties' witnesses listed at the beginning of this section do not survive careful scrutiny. There is no data analyzed, no disclosure of methods employed, nor factual bases for their opinions disclosed. The Court declines to accept the above-referenced witnesses' testimony as opinion testimony from experts.

b. Lay Opinion Testimony – FRE 701

The political parties argue that the subject declarations from past and current party officials and their political consultants may be admitted as lay opinion testimony under Fed. R. Evid. 701, which provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of

> opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The Advisory Committee Notes to the 2000 Amendments explain the import of this Rule:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996)(noting that "there is no

> good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process")

A review of the Declarations of the above-listed (Section 2 above) political party witnesses reveals that these witnesses are not simply testifying to ordinary matters within the realm of common experience, such as the appearance of persons or things, but these witnesses are giving their opinions, based on their purported experience and specialized knowledge, about the ultimate issues in the case: whether the blanket primary has caused harm to the political parties. Such testimony is improper lay opinion. *See Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 460 (5th Cir. 1996)(lay opinion testimony proper only if opinion and inferences do not require any specialized knowledge and could be reached by ordinary persons). The danger here is that rather than the factual underpinnings consisting of empirical data, the witnesses' conclusions are supported by their experience (an amorphous matter in most cases), isolated anecdotal evidence, or

belief. This kind of evidence going to critical aspects of this case does not make for proper opinion testimony – lay or expert – and it must be excluded. *See Hestor v. BIC Corp.*, 225 F.3d 178, 182 (2d Cir. 2000).

3. Insufficient Evidence of Burden

Even if one were to accept Mr. Snyder's report and the unobjectionable aspects of the political parties' lay witnesses' testimony, there is insufficient evidence to rebut the testimony of Professors Donovan and Olson. The Court would weigh the Snyder report against the professors' testimony and find that its infirmities rendered it worthless. Similarly, the Court would consider the political parties' other witnesses' testimony and find it to be insubstantial and wholly insufficient in the face of the professors' testimony.

There is before the Court, nevertheless, other evidence that is competent on the issue of whether there is a substantial burden to the political parties' association rights, and this evidence demonstrates that there is no such burden. Professor Olson stated that while there may be effects of the blanket

primary, he did not agree with the political parties as to the magnitude, the frequency, the scope of the effects, or whether they constitute "burdens" on the parties. Professor Olson also thought that there may not actually be a burden on the political party, because it may benefit by having candidates selected who may actually be more likely to win the general election. (Decl. of David J. Olson, p. 3, ¶ 7; and *see generally*, Olson Statement, competition for votes, pp. 5 & 6) Professor Olson stated that there is no legal or organizational basis for determining party membership; in the absence of party registration, state party membership is a matter of psychological identification. (Olson Dec. ¶ 11; Statement of David J. Olson, p. 4)

Professor Olson reviewed the harms and burdens that the opponents of the blanket primary have alleged and compared these with empirical studies by political scientists. (See discussion at pages 5-11 of Professor Olson's Statement.) He explained that political scientists view political parties as composed of three elements: (1) the party as organization, (2) the party in government, and

(3) the party in the electorate. As to the party as organization, citing the findings of several studies of the subject, Professor Olson concluded that the alleged harms and burdens inflicted upon political parties in Washington are without foundation. (Olson Statement, pp. 5-13)

> The empirical findings on the strength of parties as organizations may be summarized: Washington political parties successfully sustain a wide range of activities, rank high nationally on measures of organizational strength, are among the most two-party competitive in the nation, are active in raising money for candidates and remain the single most important agency for recruiting and promoting candidates for public office.

(Olson Statement, p. 7)

As to the "Party in Government," while Paul Berendt (Chair of the Washington State Democratic Central Committee) opines that elected officials selected through a blanket primary "give low or no priority" to party goals (Berendt Decl. p. 4, ll. 11-23), Professor Olson found this contention to be "absurd," because "Party is the single best predictor of how officials behave once in office." (Olson Decl. ¶ 15;

Olson Statement, (citing a study) p. 3) Furthermore, Professor Olson discussed how the "Parties in Government" exercise power in a coordinated way. From a detailed discussion, he concludes:

> From the above, in Washington State it is the party in government that organizes the legislature and decides on leadership hierarchies, sets the agenda, enforces party cohesion, and creates the LCCs [legislative campaign committees] for fund raising and other campaign support activities.

(Olson Statement, p. 9)

In beginning his discussion of the "Party in the Electorate," Professor Olson cites the parties' criticisms of the blanket primary: the "pernicious effects" of cross-over voting with malicious intent and the filing of phony candidates. (Olson Statement, p. 9) He notes that there are broad, secular trends across the 50 states, such as the rise of candidate-centered campaigns, the consequences of which must be distinguished from effects attributable to the blanket primary, per se. He notes that party loyalties in the electorate across the United States and in Washington are weaker, and that there has been a rise in the use of legislative campaign

committees (LCCs), PACs and independent expenditure groups as a partial replacement of political parties' roles. *Id.* Nevertheless, studies show that "The distribution of party loyalties in Washington generally resembles national patterns." *Id.* Professor Olson concludes further:

> It may then be said that the two parties hold issue positions at substantial variance with each other, they recruit candidates reflective of those issue positions, and once elected, partisan members of the legislative bodies significantly reflect the different positions represented by the parties and distributed through the electorate.

(Olson Statement, p. 10) Studies also conclude that cross-over voting with malicious intent simply does not occur. "There has been little evidence in the state of Washington of 'raiding' by regulars of the opposition party in order to secure the nomination of a candidate felt to be a weaker opponent." *Id.* Such a strategy, sophisticated though it is, is equally available in all direct primaries, whether of the closed, open, or blanket variety. (*See* Olson Statement, 10, 11) The parties speak often of their message of being diluted of competing for votes

across the whole electorate in the blanket primary. There is, however, a larger interest at stake: "Voters who note the disjunction between message content in the primary versus general election raise questions about candidates' sincerity, and which positions they really advocate." (*Id.* at 11)

Absent a means of identifying voters' political party affiliation, there is no way to determine that cross-over voting has occurred. The Grange points out that the Supreme court cited the Ninth Circuit's definition of cross-over voting (See *California Democratic Party* 530 U.S. at 579 n. 9), and that when Professor Olson was asked whether in Washington there were cross-over voters defined as one voting in a party to which they are not registered, Professor Olson answered "No." (Olson Dep. p.107-8) This was the only possible answer, as there is no registration of voters by party in Washington.

Professor Donovan addressed the blanket primary's influence on public attitudes toward political parties. He stated: "Survey data suggest that voter attachments to parties, and partisan

behavior in the electorate in Washington, are virtually identical to that observed in comparable states that use closed primaries." (Donovan Report p. 1) He continued: "A body of empirical work documents that public evaluations of political institutions are enhanced by electoral arrangements that allow voters more, rather than less, direct political participation." *Id.*

Professor Donovan also points out that while the political parties complain that they did not prefer some candidates who actually captured the party's nominations, "there is no data provided, however, that establishes that the party's self-identified voters did not prefer these candidates." (Donovan Supp. Decl. p. 11)

A concrete example given by Professor Donovan is Jennifer Dunn's campaign for Congress in 1992. The Republicans claim, through Mr. Meyers (former Executive Director of the Washington State Republican Party, and a consultant since 1993), that there was harm to the party in the way that she sought broad support in the primary. (Meyers Decl. p. 4) Professor Donovan pointed out that "No data or

evidence is provided to establish that Dunn was not the nominee preferred by actual Republican voters in her 8th District. No evidence is provided that establishes that cross-over voting affected the outcome of this race." (Donovan Supp. Decl. p. 12)

Another example advanced by the Republican Party is the Louisiana primary where David Duke ran as a Republican and won. (See Vance Decl. p. 6) The Louisiana system was the one cited by Justice Scalia as a permissible nonpartisan blanket primary where the top two (or however many a state prescribes) vote getters move on to the general election. (See Donovan Supp. Decl. p. 12) Professor Donovan notes that the Vance Declaration provided no evidence that Duke was not the preferred candidate of actual Republican voters, and noted additionally that analysis of surveys conducted in the 1991 Louisiana Gubernatorial runoff election found that Republicans were significantly more likely to vote for Duke than Democrats. *Id.*

The Democrats submit that the nomination of Democrat Dixy Lee Ray for the office of Governor in 1976 occurred only because Republicans,

independents, and other non-Democrats cast votes for Ms. Ray in the 1976 primary. (Dem. Mot. At 11, with ref. to Olson and Butterworth Deps. and Butterworth Decl.) Apart from Butterworth's mere assertion, however, there is no evidence of this fact.

The political parties' evidence that there is a burden on their constitutional right of association is, for the most part, incompetent and inadmissible, and at best, it is insubstantial and speculative; the political parties have failed to carry their burden of proof.

IV. CONCLUSION

The political parties have not demonstrated that there is evidence of a substantial burden to their First Amendment right of association. Accordingly, the motions of the Democratic Party and the Republican Party must be denied.

The Defendants Secretary of State and the Grange have demonstrated that Washington's blanket primary is a constitutional exercise of the State's power to regulate elections, as they have shown that the political parties have failed to come forth with sufficient evidence to prove the blanket

primary's unconstitutionality. Summary judgment is proper if a defendant shows that there is no evidence supporting an element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The State has shown that the political parties have failed to demonstrate the element of burden on their constitutional right of association. Accordingly, the State's motion for summary judgment must be granted.

NOW, THEREFORE,

IT IS ORDERED:

1. Motion of Defendant Sam S. Reed, as Secretary of State of Washington for Summary Judgment (Doc. #268) is GRANTED;
2. Motion of Plaintiff Washington State Democratic Party for Summary Judgment (Doc. #261) is DENIED;
3. Motion of Intervenor Republican State Committee of Washington for Summary Judgment (Doc. #273) is DENIED;
4. The following Motions of Defendant Reed to Strike are GRANTED;

a. Strike Declarations Submitted on behalf of Washington State Democratic Party's Motion for Summary Judgment (Doc. #289)

b. Strike Declarations Submitted on behalf of Republican Intervenors' Motion for Summary Judgment (Doc. #290) and

c. Strike Declaration of Michael Snyder and Expert Report and Attachments (Doc. #291)

5. This cause of action is DISMISSED, and the Clerk of the Court shall enter JUDGMENT in favor of Defendants.

DATED this 27 day of March, 2002.

//s//
FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

Wash. Rev. Code § 29.01.090
Major political party.

"Major political party" means a political party of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year: PROVIDED, That any political party qualifying as a major political party under the previous subsection (2) or subsection (3) of this section prior to its 1977 amendment shall retain such status until after the next state general election following June 30, 1977.

Wash. Rev. Code § 29.01.100
Minor political party.

"Minor political party" means a political organization other than a major political party

Wash. Rev. Code § 29.07.070
Voter qualification information – Verification notice.

Except as provided under RCW 29.07.260, an applicant for voter registration shall complete an application providing the following information concerning his or her qualifications as a voter in this state:

(1) The address of the last former registration of the applicant as a voter in the state;

(2) The applicant's full name;

(3) The applicant's date of birth;

(4) The address of the applicant's residence for voting purposes;

(5) The mailing address of the applicant if that address is not the same as the address in subsection (4) of this section;

(6) The sex of the applicant;

(7) A declaration that the applicant is a citizen of the United States; and

(8) Any other information that the secretary of state determines is necessary to establish the identity of the applicant and prevent duplicate or fraudulent voter registrations.

This information shall be recorded on a single registration form to be prescribed by the secretary of state.

If the applicant fails to provide the information required for voter registration, the auditor shall send the applicant a verification notice. The auditor shall not register the applicant until the required information is provided. If a verification notice is returned as undeliverable or the applicant fails to respond to the notice within forty-five days, the auditor shall not register the applicant to vote.

The following warning shall appear in a conspicuous place on the voter registration form:

> "If you knowingly provide false information on this voter registration form or knowingly make a false declaration about your qualifications for voter registration you will have committed a class C felony that is punishable by imprisonment for

up to five years, or by a fine of up to ten thousand dollars, or both imprisonment and fine."

Wash. Rev. Code § 29.13.070
Primaries.

Nominating primaries for general elections to be held in November shall be held at the regular polling places in each precinct on the third Tuesday of the preceding September or on the seventh Tuesday immediately preceding such general election, whichever occurs first.

Wash. Rev. Code § 29.15.010
Declaration and affidavit of candidacy.

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration and affidavit of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) A place for the candidate to indicate a party designation, if applicable;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under RCW 29.15.050;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29.15.050.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

Wash. Rev. Code § 29.18.010
Application of chapter.

Candidates for the following offices shall be nominated at partisan primaries held pursuant to the provisions of this chapter:

(1) Congressional offices;

(2) All state offices except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices where a county home rule charter provides otherwise.

Wash. Rev. Code § 29.18.150
Vacancies on major party ticket caused by no filing – How filled.

Should a place on the ticket of a major political party be vacant because no person has filed for nomination as the candidate of that major political party, after the last day allowed for candidates to withdraw as provided by RCW 29.15.120, and if the vacancy is for a state or county office to be voted on solely by the electors of a single county, the county central committee of the major political party may select and certify a candidate to fill the vacancy; if the vacancy is for any other office the state central committee of the major political party may select and

certify a candidate to fill the vacancy; the certificate must set forth the cause of the vacancy, the name of the person nominated, the office for which he is nominated and other pertinent information required in an ordinary certificate of nomination and be filed in the proper office no later than the first Friday after the last day allowed for candidates to withdraw, together with the candidate's fee applicable to that office and a declaration of candidacy.

Wash. Rev. Code § 29.18.160
Vacancies by death or disqualification – How filled – Correcting ballots – Counting votes already cast.

A vacancy caused by the death or disqualification of any candidate or nominee of a major or minor political party may be filled at any time up to and including the day prior to the election for that position. For state partisan offices in any political subdivision voted on solely by electors of a single county, an individual shall be appointed to fill such vacancy by the county central committee in the case of a major political party or by the state central committee or comparable governing body in the case of a minor political party. For other partisan offices, including federal or statewide offices, an individual shall be appointed to fill such vacancy by the state central committee or comparable governing body of the appropriate political party.

Should such vacancy occur no later than the sixth Tuesday prior to the state primary or general election concerned and the ballots have been printed,

it shall be mandatory that they be corrected by the appropriate election officers. In making such correction, it shall not be necessary to reprint complete ballots if any other less expensive technique can be used and the resulting correction is reasonably clear.

Should such vacancy occur after the sixth Tuesday prior to said state primary or general election and time does not exist in which to correct ballots (including absentee ballots), either in total or in part, then the votes cast or recorded for the person who has died or become disqualified shall be counted for the person who has been named to fill such vacancy.

When the secretary of state is the person with whom the appointment by the major or minor political party is filed, he shall, in certifying candidates or nominations to the various county officers insert the name of the person appointed to fill a vacancy.

In the event that the secretary of state has already sent forth his certificate when the appointment to fill a vacancy is filed with him, he shall forthwith certify to the county auditors of the proper counties the name and place of residence of the person appointed to fill a vacancy, the office for which he is a candidate or nominee, the party he represents and all other pertinent facts pertaining to the vacancy.

Wash. Rev. Code § 29.18.200
Blanket primary authorized.

Except as provided otherwise in chapter 29.19 RCW, all properly registered voters may vote for their choice at any primary held under this title, for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter.

Wash. Rev. Code § 29.19.045
Procedures – Ballot form and arrangement.

(1) Except where necessary to accommodate the national or state rules of a major political party or where this chapter specifically provides otherwise, the presidential primary must be conducted in substantially the same manner as a state partisan primary under this title.

(2) Except as provided under this chapter or by rule of the secretary of state adopted under RCW 29.19.070, the arrangement and form of presidential primary ballots must be substantially as provided for a partisan primary under this title. Whenever requested by a major political party, a separate ballot containing only the candidates of that party who have qualified under RCW 29.19.030 must be provided for a voter who requests a ballot of that party. A primary ballot, containing the names of all the candidates who have qualified for a place on the ballot under RCW 29.19.030, must be provided for nonaffiliated voters.

(3) The ballot must list alphabetically the names of all candidates for the office of president. The ballot

must indicate the political party of each candidate adjacent to the name of that candidate. Each ballot must include a blank space to allow the voter to write in the name of any other candidate.

(4) A presidential primary ballot with votes for more than one candidate is void, and notice to this effect, stated in clear, simple language and printed in large type, must appear on the face of each presidential primary ballot or on or about each voting device.

Wash. Rev. Code § 29.19.055
Allocation of delegates – Party declarations.

(1) A major political party may, under national or state party rules, base the allocation of delegates from this state to the national nominating convention of that party in whole or in part on the participation in precinct caucuses and conventions conducted under the rules of that party.

(2) If requested by a major political party, the secretary of state shall adopt rules under RCW 29.19.070 to provide for any declaration required by that party.

(3) Voters who subscribe to a specific political party declaration under this section must be given ballots that are readily distinguishable from those given to other voters. Votes cast by persons making these declarations must be tabulated and reported separately from other votes cast at the primary and may be used by a major political party in its allocation of delegates under the rules of that party.

(4) For a political party that requires a specific voter declaration under this section, the secretary of state shall prescribe rules for providing, to the state and county committees of that political party, a copy of the declarations or a list of the voters who participated in the presidential nominating process of that party.

Wash. Rev. Code § 29.24.020
Nomination by convention or write-in – Dates – Special filing period.

(1) Any nomination of a candidate for partisan public office by other than a major political party may be made only: (a) In a convention held not earlier than the last Saturday in June and not later than the first Saturday in July or during any of the seven days immediately preceding the first day for filing declarations of candidacy as fixed in accordance with RCW 29.68.080; (b) as provided by RCW 29.62.180; or (c) as otherwise provided in this section.

(2) Nominations of candidates for president and vice president of the United States other than by a major political party may be made either at a convention conducted under subsection (1) of this section, or at a similar convention taking place not earlier than the first Sunday in July and not later than seventy days before the general election. Conventions held during this time period may not nominate candidates for any public office other than president and vice president of the United States, except as provided in subsection (3) of this section.

(3) If a special filing period for a partisan office is opened under RCW 29.15.230, candidates of minor political parties and independent candidates may file for office during that special filing period. The names of those candidates may not appear on the ballot unless they are nominated by convention held no later than five days after the close of the special filing period and a certificate of nomination is filed with the filing officer no later than three days after the convention. The requirements of RCW 29.24.025 do not apply to such a convention. If primary ballots or a voters' pamphlet are ordered to be printed before the deadline for submitting the certificate of nomination and the certificate has not been filed, then the candidate's name will be included but may not appear on the general election ballot unless the certificate is timely filed and the candidate otherwise qualifies to appear on that ballot.

(4) A minor political party may hold more than one convention but in no case shall any such party nominate more than one candidate for any one partisan public office or position. For the purpose of nominating candidates for the offices of president and vice president, United States senator, or a statewide office, a minor party or independent candidate holding multiple conventions may add together the number of signatures of different individuals from each convention obtained in support of the candidate or candidates in order to obtain the number required by RCW 29.24.030. For all other offices for which nominations are made, signatures of the requisite number of registered voters must be obtained at a single convention.

Wash. Rev. Code § 29.24.070
Declarations of candidacy required, exceptions – Payment of fees.

Not later than the Friday immediately preceding the first day for candidates to file, the secretary of state shall notify the county auditors of the names and designations of all minor party and independent candidates who have filed valid convention certificates and nominating petitions with that office. Except for the offices of president and vice-president, persons nominated under this chapter shall file declarations of candidacy as provided by RCW 29.15.010 and 29.15.030. The name of a candidate nominated at a convention shall not be printed upon the primary ballot unless he pays the fee required by law to be paid by candidates for the same office to be nominated at a primary.

Wash. Rev. Code § 29.30.095
Partisan candidates qualified for general election.

The name of a candidate for a partisan office for which a primary was conducted shall not be printed on the ballot for that office at the subsequent general election unless the candidate receives a number of votes equal to at least one percent of the total number cast for all candidates for that position sought and a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary.

Wash. Rev. Code § 29.30.101
Names qualified to appear on election ballot.

The names of the persons certified as nominees by the secretary of state or the county canvassing board shall be printed on the ballot at the ensuing election.

No name of any candidate whose nomination at a primary is required by law shall be placed upon the ballot at a general or special election unless it appears upon the certificate of either (1) the secretary of state, or (2) the county canvassing board, or (3) a minor party convention or the state or county central committee of a major political party to fill a vacancy on its ticket under RCW 29.18.160.

Excluding the office of precinct committee officer or a temporary elected position such as a charter review board member or freeholder, a candidate's name shall not appear more than once upon a ballot for a position regularly nominated or elected at the same election.

Wash. Rev. Code § 29.42.010
Authority – Generally.

Each political party organization shall have the power to:

(1) Make its own rules and regulations;

(2) Call conventions;

(3) Elect delegates to conventions, state and national;

(4) Fill vacancies on the ticket;

(5) Provide for the nomination of presidential electors; and

(6) Perform all functions inherent in such an organization: PROVIDED, That only major political parties shall have the power to designate candidates to appear on the state primary election ballot as provided in RCW 29.18.150 as now or hereafter amended.

Wash. Rev. Code § 29.42.020
State committee.

The state committee of each major political party shall consist of one committeeman and one committeewoman from each county elected by the county committee at its organization meeting. It shall have a chair and vice-chair who must be of opposite sexes. This committee shall meet during January of each odd-numbered year for the purpose of organization at a time and place designated by a sufficient notice to all the newly elected state committeemen and committeewomen by the authorized officers of the retiring committee. For the purpose of this section a notice mailed at least one week prior to the date of the meeting shall constitute sufficient notice. At its organizational meeting it shall elect its chair and vice-chair, and such officers as its bylaws may provide, and adopt bylaws, rules and regulations. It shall have power to:

(1) Call conventions at such time and place and under such circumstances and for such purposes as the call to convention shall designate. The manner, number and procedure for selection of state

convention delegates shall be subject to the committee's rules and regulations duly adopted;

(2) Provide for the election of delegates to national conventions;

(3) Fill vacancies on the ticket for any federal or state office to be voted on by the electors of more than one county;

(4) Provide for the nomination of presidential electors; and

(5) Perform all functions inherent in such an organization.

Notwithstanding any provision of this chapter, the committee shall not set rules which shall govern the conduct of the actual proceedings at a party state convention.

Cal. Elec. Code § 13.
Legally qualified candidate; legislative intent

(a) No person shall be considered a legally qualified candidate for any office or party nomination for a partisan office under the laws of this state unless that person has filed a declaration of candidacy or statement of write-in candidacy with the proper official for the particular election or primary, or is entitled to have his or her name placed on a general election ballot by reason of having been nominated at a primary election, or having been selected to fill a vacancy on the general election ballot as provided in Section 8806, or having been selected as an independent candidate pursuant to Section 8304.

(b) Nothing in this section shall be construed as preventing or prohibiting any qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot, or from having that ballot counted or tabulated, nor shall any provision of this section be construed as preventing or prohibiting any person from standing or campaigning for any elective office by means of a "write-in" campaign. However, nothing in this section shall be construed as an exception to the requirements of Section 15351.

(c) It is the intent of the Legislature, in enacting this section, to enable the Federal Communications Commission to determine who is a "legally qualified candidate" in this state for the purposes of administering Section 315 of Title 47 of the United States Code.

Cal. Elec. Code § 337.
Partisan office

"Partisan office" means an office for which a party may nominate a candidate.

Cal. Elec. Code § 338.
Party

"Party" means a political party or organization that has qualified for participation in any primary election.

Cal. Elec. Code § 2150.
Affidavit of registration; contents

(a) The affidavit of registration shall show:

(1) The facts necessary to establish the affiant as an elector.

(2) The affiant's name at length, including his or her given name, and a middle name or initial, or if the initial of the given name is customarily used, then the initial and middle name. The affiant's given name may be preceded, at affiant's option, by the designation of Miss, Ms., Mrs., or Mr. No person shall be denied the right to register because of his or her failure to mark a prefix to the given name and shall be so advised on the voter registration card. This subdivision shall not be construed as requiring the printing of prefixes on an affidavit of registration.

(3) The affiant's place of residence, and residence telephone number, if furnished. No

person shall be denied the right to register because of his or her failure to furnish a telephone number, and shall be so advised on the voter registration card.

(4) The affiant's mailing address, if different from the place of residence.

(5) The affiant's date of birth to establish that he or she will be at least 18 years of age on or before the date of the next election.

(6) The state or country of the affiant's birth.

(7) The affiant's California driver's license number, California identification card number, or other identification number as specified by the Secretary of State. No person shall be denied the right to register because of his or her failure to furnish one of these numbers, and shall be so advised on the voter registration card.

(8) The affiant's political party affiliation.

(9) That the affiant is currently not imprisoned or on parole for the conviction of a felony.

(10) A prior registration portion indicating whether the affiant has been registered at another address, under another name, or as intending to affiliate with another party. If the affiant has been so registered, he or she shall give an additional statement giving that address, name, or party.

(b) The affiant shall certify the content of the affidavit as to its truth and correctness, under penalty of perjury, with the signature of his or her

name and if the affiant is unable to write he or she shall sign with a mark or cross.

(c) The affiant shall date the affidavit immediately following the affiant's signature. If any person, including a deputy registrar, assists the affiant in completing the affidavit, that person shall sign and date the affidavit below the signature of the affiant.

Cal. Elec. Code § 5001.
Political party; qualification; formation of political body; caucus or convention; filing formal notice

Whenever a group of electors desires to qualify a new political party meeting the requirements of Section 5100, that group shall form a political body by:

(a) Holding a caucus or convention at which temporary officers shall be elected and a party name designated. The designated name shall not be so similar to the name of an existing party so as to mislead the voters, and shall not conflict with that of any existing party or political body that has previously filed notice pursuant to subdivision (b).

(b) Filing formal notice with the Secretary of State that the political body has organized, elected temporary officers, and declared an intent to qualify a political party pursuant to Section 5100. The notice shall include the names and addresses of the temporary officers of the political body.

Cal. Elec. Code § 5101.
Abandonment of qualified party

Whenever the registration of any party that qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election.

Cal. Elec. Code § 7150.
Membership

The state central committee shall consist of:

(a) One member for each of the following elective officials:

(1) Governor.

(2) Lieutenant Governor.

(3) Treasurer.

(4) Controller.

(5) Attorney General.

(6) Secretary of State.

(7) All members of the State Board of Equalization.

(8) All Senators and Representatives of Congress from California.

(9) All Members of the Legislature.

(b) Members elected by county central committees pursuant to this part.

(c) Members appointed pursuant to this part.

(d) The national committeemen and national committeewomen of the party.

(e) Any person elected to fill a vacancy in the Legislature in a special election.

(f) Any immediate past party officers as may be provided by party bylaws.

(g) Members elected by Assembly district caucuses pursuant to this part.

(h) The President of the California Democratic Council.

(i) The president, vice president, northern section president, and the southern section president of the Federation of Young Democrats, and any officer of the National Young Democrats who resides in California.

(j) Former elected, nonjudicial statewide officeholders as described in Section 7153.

Cal. Elec. Code § 7209.
Disqualification

A person shall not be eligible for appointment or election to a committee who is not registered as affiliated with this party at the time of his or her appointment or election.

Cal. Elec. Code § 7215.
Removal

A committee may remove any member, other than an ex officio member, who during his or her term of membership affiliates with, or registers as a member of another party, who publicly advocates that the voters should not vote for the nominee of this party for any office, or who gives support or avows a preference for a candidate of another party or candidate who is opposed to a candidate nominated by this party.

Cal. Elec. Code § 7350.
Membership

The state central committee shall consist of:

(a) One member for each of the following public officers:

(1) Governor.

(2) Lieutenant Governor.

(3) Treasurer.

(4) Controller.

(5) Attorney General.

(6) Secretary of State.

(7) All members of the State Board of Equalization.

(8) All Senators and Representatives of Congress from California.

(9) All Members of the Legislature.

(b) The chairperson of each county central committee of the party.

(c) Members appointed pursuant to this part.

(d) The national committeeman and national committeewoman of the party.

(e) Any person elected or appointed to fill a vacancy in a partisan office.

(f) The chairperson, vice chairperson, and the immediate past chairperson of this committee.

(g) The president or chairperson, as the case may be, of each statewide, volunteer organization chartered by the state central committee or by the Republican National Committee and approved for this purpose by the executive committee of the state central committee.

Volunteer organizations chartered exclusively by the Republican National Committee and subject to this section shall file an initial petition for approval with the executive committee of the state central committee at least six months prior to the first organizational meeting. The approval, if granted, shall remain in effect indefinitely unless and until it is revoked by the executive committee.

Cal. Elec. Code § 7351.
Additional members

The following are members of the state central committee:

(a) Each officer named in subdivision (a) of Section 7350 who was nominated and elected as a

candidate of the party and whose term of office extends beyond the first Monday in December in the case of legislators and the Monday after January 1 in the case of other officers next following the direct primary election, or the appointee or successor appointed, elected, or otherwise designated by law to fill a vacancy in the office of the officer. These members are "holdover members."

(b) (1) Except as provided in paragraph (2), each candidate of the party in whose behalf nomination papers were filed and who was nominated at the direct primary election or at a special primary election by that party. These members are "nominee members." Nominees for an office the term of which extends beyond two years are members until the direct primary election at which nominations for the office are again to be made. If a nominee is elected to the office to which he or she was nominated at the succeeding general election, he or she shall be considered a "holdover member."

(2) (A) If the person most recently nominated to the Senate, Assembly, or House of Representatives received less votes for the particular office at the ensuing general election than a write-in candidate for the same office, and the write- in candidate is elected to that office at that ensuing general election, the write-in candidate shall, for the purposes of this part, be considered a "holdover member," provided that the write-in candidate's affidavit of registration reflects that that candidate has been affiliated with the party for at least 6 months prior to the general election.

(B) The person described in subparagraph (A) who was nominated to legislative office or to the House of Representatives but who was not elected to the particular office shall be designated as a "nominee member." Any person designated as a "nominee member" pursuant to this subparagraph shall be entitled to all the rights and privileges as provided other nominee members of the committee.

(c) One member appointed for each of the officers named in subdivision (a) of Section 7350, not represented by a "holdover member" nor by a "nominee member" of the party. These members shall be chosen and appointed in the manner provided in subdivision (e). These members are "appointive members."

(d) (1) Except as provided in paragraph (2), if a person qualifies more than once to be a member that person shall be a member by virtue of the most recent qualification. The resulting vacancy shall be filled pursuant to subdivision (e).

(2) If a person qualifies more than once to be a member and one of the qualifications to the committee, which is not the most recent qualification, is by virtue of the person being a holdover member, that person shall be considered a holdover member. In this instance, the resulting vacancy shall be filled pursuant to subdivision (e).

(e) Vacancies in nominee or holdover memberships shall be filled as follows:

(1) If the vacancy occurs in a senatorial or Assembly district situated wholly within the limits of a single county, by appointment by the county central committee of the party in the county. Whenever that vacancy occurs by virtue of the failure to nominate a person affiliated with the party, no person shall be chosen to fill the vacancy who does not reside in the senatorial or Assembly district involved.

(2) If the vacancy occurs in a senatorial or Assembly district comprising two or more counties, by appointment by the county central committee of the party in the county in which the disqualified or deceased member resided, if the vacancy is caused by disqualification or death, or in which the "holdover" or "nominee member" of the opposing party resides, if the vacancy is due to any other cause.

(3) If the vacancy occurs as to a member for a United States Senator from California or as to a member for any of the state officers named in subdivision (a) of Section 7350, by appointment by the state central committee.

(4) If the vacancy occurs as to a member for any Representative in Congress from California, by appointment by the state central committee of a voter who resides within the congressional district to be represented.

(f) A county central committee may authorize its chairperson to appoint members to fill vacancies in the membership which the county central committee has power to fill.

Cal. Elec. Code § 7362.
Disqualification

A person is not eligible for appointment to this committee if he or she is not registered as affiliated with this party at the time of his or her appointment.

Cal. Elec. Code § 7413.
Removal

A committee may remove any member, other than an ex officio member, who during his or her term of membership affiliates with, or registers as a member of another party, who publicly advocates that the voters should not vote for the nominee of this party for any office, or who gives support or avows a preference for a candidate of another party or candidate who is opposed to a candidate nominated by this party.

Cal. Elec. Code § 7609.
Appointees must be registered with party

A person is not eligible for appointment to this committee if he or she is not registered as affiliated with this party at the time of his or her appointment.

Cal. Elec. Code § 7660.
Removal of members

A committee may remove any member who during his or her term of membership affiliates with, or registers as a member of another party.

A committee may remove any member, other than an ex officio member, who publicly advocates that the voters should not vote for the nominee of this party for any office, or who gives support or avows a preference for a candidate of another party who is opposed to a candidate nominated by this party.

Cal. Elec. Code § 7804.
Requirements for membership

No person shall be appointed to membership on the state central committee unless she or he is registered as a voter affiliated with the Peace and Freedom Party or would register as a voter affiliated with this party if not legally prohibited from doing so.

Cal. Elec. Code § 7855.
Removal of members generally

A committee may remove any elected or appointed member, who during the term of membership, affiliates with or registers as a member of another political party, publicly advocates that the voters should not vote for the nominee of the party for any office, publicly gives support to or avows a preference for a candidate of another party or candidate who is opposed to a candidate nominated by this party, or has violated the bylaws or constitution of the committee.

Cal. Elec. Code § 15451.
Party nominee; determination

The person who receives the highest number of votes at a primary election as the candidate of a political party for the nomination to an office is the nominee of that party at the ensuing general election.

Cal. Elec. Code § 8001.
Party affiliation

(a) No declaration of candidacy for a partisan office or for membership on a county central committee shall be filed, by a candidate unless (1) at the time of presentation of the declaration and continuously for not less than three months immediately prior to that time, or for as long as he has been eligible to register to vote in the state, the candidate is shown by his affidavit of registration to be affiliated with the political party the nomination of which he seeks, and (2) the candidate has not been registered as affiliated with a qualified political party other than that political party the nomination of which he seeks within 12 months, or, in the case of an election governed by Chapter 1 (commencing with Section 10700) of Part 6 of Division 10, within three months immediately prior to the filing of the declaration.

(b) The elections official shall attach a certificate to the declaration of candidacy showing the date on which the candidate registered as intending to affiliate with the political party the nomination of which he seeks, and indicating that the candidate

has not been affiliated with any other qualified political party for the period specified in subdivision (a) immediately preceding the filing of the declaration. This section shall not apply to declarations of candidacy filed by a candidate of a political party participating in its first direct primary election subsequent to its qualification as a political party pursuant to Section 5100.

Cal. Elec. Code § 8003.
Independent nominees

This chapter does not prohibit the independent nomination of candidates under Part 2 (commencing with Section 8300), subject to the following limitations:

(a) A candidate whose name has been on the ballot as a candidate of a party at the direct primary and who has been defeated for that party nomination is ineligible for nomination as an independent candidate. He is also ineligible as a candidate named by a party central committee to fill a vacancy on the ballot for a general election.

(b) No person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election.

Cal. Elec. Code § 8020.
Nomination documents required

(a) No candidate's name shall be printed on the ballot to be used at the direct primary unless the

following nomination documents are delivered for filing to the county elections official:

(1) Declaration of candidacy pursuant to Section 8040.

(2) Nomination papers signed by signers pursuant to Section 8041.

(b) The forms shall first be available on the 113th day prior to the direct primary election and shall be delivered not later than 5 p.m. on the 88th day prior to the direct primary.

(c) Upon the receipt of an executed nomination document, the county elections official shall give the person delivering the document a receipt, properly dated, indicating that the document was delivered to the county elections official.

(d) Notwithstanding Section 8028, upon request of a candidate, the county elections official shall provide the candidate with a declaration of candidacy. The county elections official shall not require a candidate to sign, file, or sign and file, a declaration of candidacy as a condition of receiving nomination papers.

Cal. Elec. Code § 8022.
Declaration of candidacy

(a) Each candidate for a party nomination for the office of State Senator or Member of the Assembly, or for any state constitutional office, or for Insurance Commissioner, at the direct primary election shall file a written and signed declaration of his or her intention to become a candidate for his or her party's

nomination for that office. The declaration of intention shall be filed with either the Secretary of State or the elections official of the county in which the candidate is a resident. The declaration of intention shall be filed, on a form to be supplied by the elections official, not more than 14 nor less than five days prior to the first day on which nomination papers may be presented for filing. If the incumbent fails to file a declaration of intention by the end of that period, persons other than the incumbent may file declarations of intention no later than the first day for filing nomination papers. However, if the incumbent's failure to file a declaration of intention is because he or she has already served the maximum number of terms permitted by the California Constitution for that office, there shall be no extension of the period for filing the declaration of intention. The filing fees and copies of all declarations of intention filed with the county elections official in accordance with this article shall be immediately forwarded to the Secretary of State. The declaration of intention provided for in this section shall be in substantially the following form:

I hereby declare my intention to become a candidate for the (Name of political party) Party's nomination for the office of (Name of office and district, if any) at the direct primary election.

(Signature of candidate)

(Address of candidate)

(b) No person may be a candidate nor have his or her name printed upon any ballot as a candidate for a party nomination for the office of Senator or

Member of the Assembly, or for any state constitutional office, or for Insurance Commissioner at the direct primary election unless he or she has filed the declaration of intention provided for in this section. However, if the incumbent of the office who is affiliated with any qualified political party files a declaration of intention, but for any reason fails to qualify for nomination for the office by the last day prescribed for the filing of nomination papers, an additional five days shall be allowed for the filing of nomination papers for the office, and any person, other than the incumbent if otherwise qualified, may file nomination papers for the office during the extended period, notwithstanding that he or she has not filed a written and signed declaration of intention to become a candidate for the office as provided in subdivision (a).

Cal. Elec. Code § 8066.
Qualifications of circulators

Circulators appointed pursuant to this article shall be voters in the district or political subdivision in which the candidate is to be voted on and shall serve only in that district or political subdivision.

Cal. Elec. Code § 8068.
Qualifications of signers

Signers shall be voters in the district or political subdivision in which the candidate is to be voted on and shall be affiliated with the party, if any, in which the nomination is proposed.

Cal. Elec. Code § 12108.
Precinct board members; political affiliation; publication of list

In any case where this chapter requires the publication or distribution of a list of the names of precinct board members, or a portion of the list, the officers charged with the duty of publication shall ascertain the name of the political party, if any, with which each precinct board member is affiliated, as shown in the affidavit of registration of that person. When the list is published or distributed, there shall be printed the name of the board member's party or an abbreviation of the name to the right of the name, or immediately below the name, of each precinct board member. If a precinct board member is not affiliated with a political party, the words "No party," "Nonpartisan," or "Decline to state" shall be printed in place of the party name.

Cal. Elec. Code § 12306.
Appointment of board members; nominations by central committees

The county elections official of any county, in appointing members of the several precinct boards to serve in the direct primary and general elections under the provisions of this code, shall permit the county central committee of each qualified political party to nominate for appointment to the precinct board a member of that party who is registered and resident in that precinct. Nomination pursuant to this section shall be made in writing to the county elections official not less than 90 days before the election for which the nomination is made. In

making appointments to precinct boards from nominations submitted by political parties, the county elections official shall give preference to the nominee of any qualified political party with at least 10 percent of the registered voters in the precinct for which the nomination is made.

Cal. Elec. Code § 15451.
Party nominee; determination

The person who receives the highest number of votes at a primary election as the candidate of a political party for the nomination to an office is the nominee of that party at the ensuing general election.

No. 03-801

Supreme Court, U.S.
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In The

Supreme Court of the United States

SAM REED, Secretary of State of Washington,

Petitioner,

v.

DEMOCRATIC PARTY OF WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID T. MCDONALD
Counsel of Record
JONATHAN H. HARRISON
PRESTON GATES & ELLIS LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104
(206) 623-7580

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Washington State requires the Democratic Party to accept as a Democratic candidate for partisan office any registered voter who desires to run. Washington further requires the Democratic Party to accept as its general election nominee the candidate who receives the most votes in a blanket primary.

Should Washington's blanket primary be subjected to strict scrutiny in light of *California Democratic Party v. Jones*, 530 U.S. 567 (2000)?

PARTIES

The parties to the proceeding below were correctly identified by the State in its Petition with the following exceptions:

Respondents: "Vivan Caver" should be "Vivian Caver." "Ted Highley" should be "Ted Higley."

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Wash. Rev. Code § 29.18.200 11

Wash. Rev. Code § 29.19.055 21

Wash. Rev. Code § 29.24.020 11

Wash. Rev. Code § 29.30.095 11

Wash. Rev. Code § 29.30.101 11

Wash. Rev. Code § 29.42.010 13

Wash. Rev. Code § 42.17.350 13

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CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I 1, 3, 20

U.S. Const. Amend. XIV, § 1 1

STATEMENT

This case was brought under 42 U.S.C. § 1983 to enforce the right of association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The case arises from Washington State's continuing requirement that the Democratic Party's general election candidate must be selected by means of a blanket primary despite this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Cal. Dem. Party*").

Washington contends that its blanket primary is materially different from the California blanket primary reviewed by this Court in *Cal. Dem. Party*. After review of the State's arguments, the Ninth Circuit found Washington's blanket primary to be materially indistinguishable from the California blanket primary and applied strict scrutiny as required by *Cal. Dem. Party*. None of the interests identified by Washington State were found to be compelling. *Washington State Democratic Party v. Reed*, 343 F.3d 1198, 1204-07 (9th Cir. 2003). Accordingly, the Ninth Circuit declared Washington's blanket primary unconstitutional.

The State does not challenge the Ninth Circuit's conclusion that Washington's blanket primary fails strict scrutiny. Petition for a Writ of Certiorari ("Petition") at n.13. The sole issue presented by this case is whether the Ninth Circuit erred in concluding that Washington's blanket primary should be subjected to strict scrutiny.

The Ninth Circuit generally set forth the material facts in its opinion. 343 F.3d at 1201-02. The following

material supplements the Ninth Circuit description with respect to matters raised by the State in its Petition.

1. The History of the Blanket Primary in Washington

a. Washington's Blanket Primary Was Engrafted Upon a Party Nomination System

In 1907 Washington adopted a direct primary law, requiring political parties to select their candidates by public primary. Political parties could require oaths of support for the party and its candidates as a condition to receiving a party ballot. The political parties objected to the imposition of the primary. Washington's Supreme Court upheld the direct primary, ruling that political parties were not protected by the Constitution and that "a law will not be held to be unconstitutional, although in its workings it may destroy these organizations." *State ex rel. Zent v. Nichols*, 97 P. 728, 732 (Wash. 1908).

In 1935, Washington created the nation's first blanket primary system. The State repealed the portions of its direct primary law which allowed parties to limit participation in their primaries to supporters of their party and abrogated the use of primary ballots that listed the candidates of only one party in favor of a common ballot that allowed a voter to go back and forth between party primaries on an office by office basis. The primary process remained a party nomination process, albeit one in which the parties were forced to let non-adherents participate:

> Chapter 26, *supra*, cannot be considered as the adoption of the "non-partisan" system in the nomination and election of public officers. It simply provides a method by which voters can nominate *candidates to run as the nominees of the*

> *various parties* at the general election, without being compelled to disclose the political affiliation of the voters and without limiting the right of the voter to participate in the primary of one party only.

(ER 1199 (September 9, 1935 Opinion of Attorney General of Washington) (emphasis added).)

b. Prior Challenges to Washington's Blanket Primary

A Republican voter challenged the constitutionality of the new blanket primary law but his challenge was rejected, again on the basis that the Constitution did not protect political parties. *Anderson v. Millikin*, 59 P.2d 295, 296-97 (Wash. 1936) (citing *Zent*).

In 1980, after this Court explicitly recognized a First Amendment right of association, a faction[1] of the Democratic Party in Washington again challenged the blanket primary. *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). The Washington Supreme Court acknowledged that its holding in *Anderson* would need to be re-examined in light of the now-recognized constitutional right of association. 611 P.2d at 1257. Nevertheless, the court again rejected the challenge to the blanket primary, this time on the basis that no evidence of a burden upon associational rights had been introduced. 611 P.2d at 1258. The Washington Supreme Court decided *Heavey* before this Court

[1] The Democratic Party was implementing a substantial reorganization at the time. Some of the difficulties involved in the implementation are described in *Marchioro v. Chaney*, 442 U.S. 191 (1979).

held in *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), that the right of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." 450 U.S. at 122.

After the *Cal. Dem. Party* decision in 2000, the Democratic Party renewed its objections to Washington's blanket primary. The State continues to use its partisan blanket primary and forced the Democratic Party to accept nominees selected by the blanket primary in 2001, 2002 and 2003.

2. The Determination of the Constitutionality of the Blanket Primary in *California Democratic Party v. Jones* Was Based Upon the Operation and Effect of Washington's Blanket Primary

In 1996 California adopted a blanket primary system modeled on the Washington State blanket primary. Political parties challenged the constitutionality of the blanket primary. Defenders of the blanket primary submitted evidence of the effects of a blanket primary on political parties and their communications with the public. The source of much of this evidence was Washington's experience with its blanket primary. *See, e.g., California Democratic Party v. Jones*, 984 F. Supp. 1288, 1298 n.24 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000) (based on Washington's experience with its blanket primary, cross-over voting rarely influences the outcome of a party's primary); *id.* at 1298 (based on Washington's experience with its blanket primary, as to the election for any particular office approximately 10% of the voters are cross-over voters, excluding independents, and the figure may rise to 20-25%); *id.* at 1298 (all but

approximately 25-33% of the voters cross over at least once while voting the blanket primary ballot); *id.* at 1300 n.29 (political parties are strong in Washington despite blanket primary and hence California political parties would suffer little diminution as a result of blanket primary).

Based upon this evidence about the operation and effect of Washington's blanket primary on political parties, the district court declared that the burden placed upon the First Amendment right of association by California's blanket primary was significant but not severe and held the blanket primary constitutional. *California Democratic Party*, 984 F. Supp. 1288, 1297-1301, 1303 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000). The Ninth Circuit agreed, adopting the district court opinion as its own. *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000). This Court granted certiorari and Washington State was granted leave to file a brief as *amicus curiae* in support of the blanket primary.

The State of Washington advised the Court:

> In considering the Political Parties' challenge to California's blanket primary system, the district court had the advantage of receiving substantial evidence concerning the actual effect of a long-standing blanket primary system on political parties. Such evidence quite properly informed the judgment of the district court and similarly serves to inform the judgment of this Court. . . . [T]hat evidence was drawn from the experience of Washington with its blanket primary system. . . .

Brief of the States of Washington and Alaska as Amici Curiae in Support of Respondents at 2-3 ("Amicus Brief"),

California Democratic Party v. Jones, 530 U.S. 567 (2000) (No. 99-401). After review and argument, this Court determined that the blanket primary imposed a severe burden upon the First Amendment right of association, requiring that it survive strict scrutiny, and referred again to evidence of the experience of political parties under the blanket primary in Washington State. *California Democratic Party v. Jones*, 530 U.S. 567, 577-82 (2000). After evaluating the interests asserted by California and the *Amici* as justifying the burden placed upon the right of association, this Court found none of them to be compelling. *Id.* at 582-85.[2]

3. The Record in This Case Also Showed Severe Burden From Washington's Blanket Primary on Political Parties Including Dilution of Party Members' Votes, Changes in Candidate Behavior, and Alteration of the Party's Message

The State experts in this case reconfirmed the effects of Washington's blanket primary that had been noted in *Cal. Dem. Party*.[3] Adulteration of the party candidate selection process occurs under Washington's blanket primary:

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[2] The asserted State interests reviewed by the Court in its *Jones* opinion included several interests asserted by the State of Washington in its *Amicus* brief. Amicus Brief at 13-16.

[3] References to "ER" are references to the Excerpts of Record in the Ninth Circuit. The district court accepted evidence from the State's experts in connection with the political parties' motions for summary judgment. This evidence is the basis of the factual assertions in this Statement with regard to the blanket primary's impact.

> . . . [C]ross over voting does occur under the blanket primary system in Washington State . . . it is somewhat surprising that one-quarter to one-third of voters cast their primary votes within one party column only.

(ER 1024 (Statement of David J. Olson[4]).) The dilution of the votes of party adherents was characterized as the "price to pay" for having a blanket primary. (ER 1010-11 (Declaration of David J. Olson); *cf.* ER 0579-80 (Deposition of Todd Donovan) (rate of participation of non-party members increases under blanket primary system).)

Cal. Dem. Party called "obvious" the proposition that "these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful." *Cal. Dem. Party*, 530 U.S. at 578. This obvious proposition is true in Washington as well as California. "[T]he priorities of the party faithful . . . have a pronounced ideological tilt to them that is at odds with rank-and-file voters." (ER 1025 (Declaration of David J. Olson).) Organizations such as the Grange, which intervened in this case to defend the blanket primary, have interests that diverge from the views of the party members whose primaries are invaded under the blanket primary system. (ER 1072.) One of the purposes of Washington's blanket primary law was to enable voters to form ad hoc political associations to cross party lines in the primary. *Reed*, 343 F.3d at 1206.

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[4] Professor Olson provided evidence of the impacts of Washington's blanket primary in *Cal. Dem. Party* as well. *See, e.g.*, 169 F.3d at 656-7, n.24 and n.29.

Party candidates change their message because of Washington's blanket primary:

> Because candidates under the blanket primary have to appeal not only to their own party identifiers, but also independents and opposite party identifiers, candidates have incentives to craft and offer messages that appeal to the median voter. . . .

(ER 1025.)

> The messages of candidates in a closed primary, regardless of its temporal proximity to the general election, are most likely to be significantly different than the messages of candidates in a blanket primary.

(ER 0638.) The blanket primary results in the selection of general election nominees who are philosophically less distinguishable from each other than would occur if each party's nominee was selected by voters from that party and, in some cases, are different from the nominees who would be selected in a primary where participation was limited as required by Party rules. (ER 0626-27; 1025-26; 0634-35.)

4. Concession by State Officials of the Unconstitutionality of Washington's Blanket Primary and the Proceedings Below

In the aftermath of this Court's decision in *Cal. Dem. Party*, Washington election officials conceded that

Washington's primary election system is unconstitutional[5] but indicated that they were compelled to follow state law until the State Legislature modified it.[6] The Washington Democratic Party and several of its members brought this action for declaratory and injunctive relief on the eve of the 2000 primary. (ER 00001-0031.) The district court entered a stipulated preliminary injunction that barred use of the blanket primary after the pending 2000 primary and deferred further court action until after the 2001 regular Session of the Washington State Legislature. (ER 0068-76.) The Legislature failed to modify the blanket primary system and the political parties pursued their remedies in federal court. In response, the State asserted that a constitutional primary could not be conducted under existing law and that the case was about the details of, rather than the need for, injunctive relief. (ER 0197-98; ER 0221-26.)

The district court nevertheless dissolved the preliminary injunction and set the case for trial. (ER 0392-407.) Thereafter, the State abandoned its prior position with respect to the constitutionality of Washington's blanket primary. In its place, the State argued that Washington's blanket primary was materially different from California's

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[5] *See, e.g.*, Statement by Secretary of State Ralph Munro, as reported by the Everett Herald, that "[if] [the political parties] sued us, obviously we'd lose the case." The Secretary admitted giving the quote in answering the Democratic Party's complaint in this case. (ER 00009-10, ¶ 36 (Complaint) and ER 0081-82, ¶ 36 (Answer).)

[6] (ER 0030-31 (July 11, 2000 letter from Secretary of State Ralph Munro to Paul Berendt of the Washington State Democratic Central Committee); ER 0222-23 (Declaration of Secretary of State Sam Reed).)

because under Washington's primary system the public, not the major political parties, nominated the party candidates who would appear on the general election ballot.[7] The district court accepted the State's new argument as a defense of the blanket primary, but the Ninth Circuit rejected it:

> As for the State of Washington's argument that the party nominees chosen at blanket primaries "are the 'nominees' not of the parties but of the electorate," that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees.

343 F.3d at 1204. The Ninth Circuit found that:

> . . . under [*Cal. Dem. Party*], the Washington blanket primary system is materially indistinguishable from the California blanket primary system and is unconstitutional unless the defendants bear their burden of demonstrating that it is "narrowly tailored to serve a compelling state interest."

343 F.3d at 1204.

After analysis of the interests asserted by the blanket primary's defenders, the Ninth Circuit concluded that the

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[7] The State's current view of Washington law leads to a constitutionally suspect result. Washington separates political parties into two classes: "major" and "minor." *See* section 5a *infra*. The two classes have different nominating procedures. As the State now characterizes its blanket primary law a minor political party is allowed to nominate candidates until the party begins to be successful enough to be a major party. Petition at 14. Then, as a major party, it is stripped of the right to nominate, thus allowing the nascent party to be hijacked, and its potentially successful message to be distorted, by non-adherents.

defenders of the blanket primary had not borne their burden and declared Washington's blanket primary unconstitutional.

5. Misstatements in Petition

a. Blanket Primary Winners Are Party Nominees

The Petition incorrectly states "Washington law does not describe candidates qualifying for the general election as party nominees." Petition at 12-13.

Political parties in Washington are divided by statute into "Major" political parties and "Minor" political parties. The nomination processes of the two kinds of parties are subjected to different regulation. Minor political parties are permitted to nominate their candidates by convention. Wash. Rev. Code § 29.24.020.[8] Major political parties are required to nominate their candidates through the blanket primary. Wash. Rev. Code § 29.18.010; Wash. Rev. Code § 29.30.095; Wash. Rev. Code § 29.30.101; and Wash. Rev. Code § 29.18.200. A major political party is "a political party of which at least one nominee for President, Vice-President, United States Senator, or a statewide office received at least five percent of the total vote cast at the last preceding general election. . . ." Wash. Rev. Code § 29.01.090. The State in its petition summarizes this statute to avoid highlighting its reference to a nominee of

[8] With the exception of statutes from Title 42 of the Revised Code of Washington, all Washington statutes that are cited in this brief are reprinted in full in the Appendix to the Petition, pp. 85a-99a. Statutes from Title 42 cited in this brief are reprinted in full in the Appendix to this Opposition.

the party, substituting the phrase "candidate designating a party" for "political party of which at least one nominee." Petition at n.11.

Major political parties are permitted to fill vacancies on their general election ballot tickets. Pursuant to Washington law, a vacancy in a major party ticket occurs when "no person has filed for nomination as the candidate of that major political party." Wash. Rev. Code § 29.18.150. The State Petition omits the reference to "nomination as the candidate of that political party," and summarizes the statute as saying that a major political party can fill a vacancy that occurs "if no one designating that party files for a partisan office." Petition at 15. Major political parties can also fill vacancies caused by the death or disqualification of "any candidate or nominee of a . . . political party" before the general elections. Wash. Rev. Code § 29.18.160. The State Petition does not mention the provision for filling vacancies caused by the death or disqualification of a "nominee of a . . . political party," and summarizes this statute as saying that a party can fill vacancies caused by the death or disqualification of "a candidate for partisan office." Petition at 15.

Washington statutes make clear that nominees selected by the blanket primary represent parties, not the electorate in general. When a vacancy due to death or disqualification is filled after certification of the original candidate or nominee has occurred, the secretary of state must certify the name of the person appointed to fill the vacancy, "the office for which he is a candidate or nominee, [and] the party he represents. . . ." Wash. Rev. Code § 29.18.160.

Washington courts similarly recognize the winner of the blanket primary as the Party's nominee. *See Becker v. County of Pierce*, 890 P.2d 1055, 1056 (Wash. 1995) ("In the . . . 1992 primary election, Nina Becker and Brian Sonntag were . . . vying to be the nominee of the Democratic Party. . . ."); *Kitsap Republican Central Committee v. Huff*, 620 P.2d 986, 990 (Wash. 1980) (if convicted of crime, primary winner loses his right to be the "Democratic Party's nominee"); *Knowles v. Holly*, 513 P.2d 18, 23 (Wash. 1973) ("[T]he purpose of the primary is to designate party nominees. . . .").

b. Party Affiliation Is Authorized in Washington and Officially Recognized by the State

The State's Petition at note 2 asserts that Washington statutes do not authorize voters to affiliate with political parties. Similarly, at page 16 of its Petition the State asserts that Washington "takes no official notice of party membership." Both assertions are incorrect. Washington statutes recognize political parties and give them all powers inherent in such an organization. Wash. Rev. Code § 29.42.010. By the State's own admission, the party affiliation of voters who run for office determines whether they will advance to the general election. Petition at 13. State law limits appointments to boards and commissions based upon partisan affiliation – a concept difficult to implement if voters are not authorized to affiliate with political parties and inconsistent with the State failing to take official notice of party membership. *See, e.g.*, Wash. Rev. Code § 42.17.350(1) (no more than three members of Public Disclosure Commission may come from the same political party).

c. Washington's Blanket Primary Bears No Resemblance to the Non-Partisan Blanket Primary Described in Cal. Dem. Party

The State's Petition at note 7 incorrectly suggests that its blanket primary is constitutionally similar to the nonpartisan blanket primary described by the Court in *Cal. Dem. Party* because in neither system are the voters choosing the party's nominees. The Court's system and Washington's system are dramatically different. In the Court's system the voters are choosing among candidates who have been previously nominated by each political party. *Cal. Dem. Party*, 530 U.S. at 598, n.8 (Stephens, J., dissenting) ("[U]nder the Court's reasoning . . . [the State has the option] . . . to have what the Court calls a 'nonpartisan primary' . . . in which candidates previously nominated by the various political parties and independent candidates compete."). Unlike the system described by the Court, in Washington, political parties must accept any candidate who files and prevails in the blanket primary as their nominee. As the Ninth Circuit found, Washington's blanket primary injects non-adherents into the party candidate selection process and "prevents a party from picking its nominees." 343 F.3d at 1204.

REASONS FOR DENYING THE PETITION

The Petition should be denied for the most basic reason: The Ninth Circuit correctly applied the law and reached the correct result. Moreover, there is no conflict between courts that warrants review and the Ninth Circuit decision is isolated in its effects.

1. The Ninth Circuit Did Not Err

The State bases its request for certiorari on an assertion that the Ninth Circuit proceeded "from the proposition that *Cal. Dem. Party* invalidates the use of the blanket primary in any circumstances." Petition at 16. Contrary to the State's argument, the Ninth Circuit did not immediately conclude that *Cal. Dem. Party* had invalidated Washington's blanket primary, although such a conclusion would have been a reasonable reading of the case. *See, e.g., Cal. Dem. Party*, 530 U.S. at 2420 (Stevens, J., dissenting) (noting the Court's "willingness to invalidate the primary schemes of [Alaska, California and Washington]"). Instead, the Ninth Circuit examined whether there was any material distinction between the Washington and California blanket primaries, found none, and subjected Washington's primary to strict scrutiny. The Ninth Circuit did not err. Its conclusion is supported both by prior statements by the State asserting the constitutional identify of the Washington and California blanket primaries and by the record in this case.

The State of Washington previously urged this Court to treat the two blanket primary election systems as constitutionally identical. This Court, in reaching its decision in *Cal. Dem. Party*, was amply advised about Washington's blanket primary and the Washington Supreme Court's reasoning. The *amicus* brief submitted by Washington in support of California's blanket primary did not disclose any significant constitutional difference between the blanket primary systems of Alaska, California, and Washington. Washington's *amicus* argued that California's primary was constitutional because Washington's blanket primary does not severely burden the associational rights of political parties. Amicus Brief at 16-18.

Washington's *amicus* acknowledged that blanket primary systems (such as Washington's) restrict political parties' associational interests in candidate nomination but argued that doing so was not a severe burden because the parties had other rights that could be exercised. *Id.* at 20. The *amicus* brief directed the Court to the Washington Supreme Court's analysis of alleged compelling interests served by Washington's blanket primary. *Id.* at 14. Washington's *amicus* even quoted the Washington Supreme Court's reasoning to support Washington's assertion to this Court that the blanket primary was precisely tailored to the compelling interests of Alaska, California and Washington. *Id.* at 22-23.

Washington asserted in its *amicus* in *Cal. Dem. Party* that there was no significant constitutional difference between its blanket primary and California's:

> . . . [T]he essential premise of [the Political Parties'] challenge to blanket primary election systems applies well beyond this case. The premise of the Political Parties' argument, and the basis for the constitutional defect that they allege infects blanket primary election systems, is that the states may not allow non-party members to vote in primary elections, because only party members are entitled to choose the party's "standard bearer."

Amicus Brief at 9. Washington acknowledged in its *amicus* that, if the Court agreed with the Political Parties in respect to the California primary, it would be deciding the validity of all blanket primary systems generally. *Id.* at 24.

Based upon evidence of the actual effects of Washington's blanket primary upon political parties in Washington, this Court in *Cal. Dem. Party* held:

> In sum, [the blanket primary] forces petitioners to adulterate their candidate-selection process – the "basic function of a political party" – by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome . . . of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. [The blanket primary] is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.

530 U.S. at 581-82 (citation omitted).

Washington's blanket primary has not changed since Washington submitted its *amicus*. The State's own evidence in this case shows that the blanket primary interferes in the party's choice of messengers and the message the party delivers. *See* section III *supra*.

Washington argued to the Ninth Circuit that its blanket primary should not be subjected to the same strict scrutiny that this Court imposed upon California's blanket primary because two distinctions existed between the Washington and California primaries. The Ninth Circuit carefully considered the distinctions that Washington asserted existed between its blanket primary and California's – that no party nominees are selected in Washington and Washington has no party registration – and concluded that these were "distinctions without a [constitutional] difference." *Reed*, 343 F.3d at 1203-4.

It was not error for the Ninth Circuit to reject Washington's arguments. Washington's argument that its primary does not burden rights of association because the people, not the party, select nominees associated on the ballot with the party is circular and does not address the

substance of the constitutional burden. The State cannot unilaterally make severely burdensome interference constitutionally permissible by deciding during pending litigation to simply label the result of its interference the nominee of the people rather than a nominee of the party. The State has no right to change a party's message by forcing it to associate with candidates on the general election ballot who have been selected in violation of party rules, whether or not those candidates are labeled "nominees." Moreover, Washington's argument is simply not true. It is blatantly contradicted by Washington statutory and case law and political history. *See* section 5a *supra*.

The Ninth Circuit also correctly concluded that the absence of party registration in Washington did not mean that voters in Washington have no party preferences. The State's expert, Dr. Olson, advised the district court that:

> A recent survey of voter identification with parties reveals that in Washington State there is close parity between Republican and Democratic party identifiers and those calling themselves independent in Washington are nearly identical with those who similarly label themselves nationally.[9]

(ER 1023.) The Ninth Circuit found that the right of these party adherents to select their nominee was thwarted by

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[9] The testimony of Dr. Todd Donovan on behalf of the State was similar: "Survey data suggest that voter attachments to parties, and partisan behavior in the electorate in Washington, are virtually identical to that observed in comparable states that use closed primaries." (ER 0801.)

Washington's blanket primary. Dilution of the votes of party adherents and alteration of the message of party candidates was conceded by State experts. *Supra* at section 3. The Ninth Circuit correctly concluded that the burden placed upon the right of association of party adherents by Washington's blanket primary is severe.

2. The Ninth Circuit Decision Does Not Conflict With Decisions of Any Federal Court or Washington's Supreme Court and Any Such Conflict Would Be Stale

The State does not assert that the Ninth Circuit decision conflicts with any decision of this Court or any Circuit. The sole conflict asserted by Washington is with decisions of the Washington Supreme Court in 1936 and 1980.

Washington asserts that the Ninth Circuit's decision conflicts with the decisions of the Washington Supreme Court in the 1936 case of *Anderson v. Millikin*, 59 P.2d 295, and the 1980 case of *Heavey v. Chapman*, 611 P.2d 1256.

The Ninth Circuit's decision, like this Court's decision in *Cal. Dem. Party*, was based upon the First Amendment right of association. The *Anderson* case was premised upon the belief that the Constitution provides no First Amendment protection to political parties. This conclusion is not valid, as this Court made clear in *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121-22 (1981), and *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). The Washington Supreme Court itself subsequently recognized that *Anderson* did not resolve constitutional issues related to the blanket primary that were

based on the First Amendment right of association. *Heavey*, 611 P.2d at 1256. There is no conflict between the Ninth Circuit's decision and the Washington Supreme Court's decision in *Anderson* that warrants review by this Court.

The *Heavey* decision was premised, in substantial part, upon the Washington Supreme Court's conclusion that the First Amendment right of association did not extend in political affairs beyond racial discrimination or participation in the electoral process, and that the challenge to the blanket primary before it at that time did not allege racial discrimination or impediment of participation in the electoral process. 611 P.2d at 1156. The Washington Supreme Court decided *Heavey* before this Court announced its decisions in *La Follette; Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); and *Cal. Dem. Party*, all of which extended the First Amendment right of association beyond the only two areas in which the *Heavey* Court believed it relevant. There is no reason to believe that Washington's Supreme Court would today fail to appreciate the extent of the First Amendment right of association and the burden on associational rights imposed by blanket primaries.

Moreover, when it decided *Heavey*, the Washington Supreme Court did not have before it the overwhelming evidence of burden caused by the Washington blanket primary that was submitted to this Court in connection with *Cal. Dem. Party* and that was in the record reviewed by the Ninth Circuit in this case. There is no reason to believe it would have ignored that evidence or, after

reviewing it, reached a different conclusion than this Court about the magnitude of the constitutional burden imposed upon the right of association by Washington's blanket primary.

Finally, Washington State has adopted its presidential preference primary since its Supreme Court decided *Heavey*. As the Ninth Circuit noted, Washington's presidential preference primary requires voters to disclose their political affiliation as a condition of voting in the primary and requires the State to disclose those affiliations to the political parties. Wash. Rev. Code § 29.19.055. *Heavey's* conclusion that Washington has a compelling interest in protecting the party affiliation of its voters is no longer valid (if it ever was) in light of the State's action in adopting the presidential preference primary.

There is no conflict between the Ninth Circuit's decision and the decision of the Washington Supreme Court that warrants review by this Court.

3. The Ninth Circuit Decision Does Not Raise an Issue of Broad Public Import

Washington admits that it is the only state affected by its petition and that "it is unlikely that any conflict will ever develop among the circuits on the proper interpretation of this Court's *Cal. Dem. Party* decision or the general issue of the constitutionality of blanket primaries." Petition at 22-23. Essentially the State seeks review for the purpose of obtaining an advisory opinion for its Legislature to use in crafting a replacement for its existing unconstitutional blanket primary. Petition at n.15.

Both the Ninth Circuit decision in this case and the *Cal. Dem. Party* opinion that the Ninth Circuit used as a road map to make its decision are clear, well-grounded decisions. There is no circumstance presented by this case that warrants the grant of a writ of certiorari.

CONCLUSION

The Ninth Circuit decision is correct. The Petition of the State of Washington for writ of certiorari in this case should be denied.

Respectfully submitted,

DAVID T. MCDONALD
Counsel of Record
JONATHAN H. HARRISON
Preston Gates & Ellis LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104
(206) 623-7580

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APPENDIX

Statutes

U.S. Const. Amend. XIV, § 1 ..... App. 1
42 U.S.C. § 1983 ..... App. 1
Wash. Rev. Code § 42.17.350 ..... App. 1

U.S. Const. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Wash. Rev. Code § 42.17.350 provides:

(1) There is hereby established a "public disclosure commission" which shall be composed of five members who shall be appointed by the governor, with the consent of the

senate. All appointees shall be persons of the highest integrity and qualifications. No more than three members shall have an identification with the same political party.

(2) The term of each member shall be five years. No member is eligible for appointment to more than one full term. Any member may be removed by the governor, but only upon grounds of neglect of duty or misconduct in office.

(3) During his or her tenure, a member of the commission is prohibited from engaging in any of the following activities, either within or outside the state of Washington:

(a) Holding or campaigning for elective office;

(b) Serving as an officer of any political party or political committee;

(c) Permitting his or her name to be used in support of or in opposition to a candidate or proposition;

(d) Soliciting or making contributions to a candidate or in support of or in opposition to any candidate or proposition;

(e) Participating in any way in any election campaign; or

(f) Lobbying, employing, or assisting a lobbyist, except that a member or the staff of the commission may lobby to the limited extent permitted by RCW 42.17.190 on matters directly affecting this chapter.

(4) A vacancy on the commission shall be filled within thirty days of the vacancy by the governor, with the consent of the senate, and the appointee shall serve for the remaining term of his or her predecessor. A vacancy shall not impair the powers of the remaining members to exercise all of the powers of the commission.

(5) Three members of the commission shall constitute a quorum. The commission shall elect its own chair and adopt its own rules of procedure in the manner provided in chapter 34.05 RCW.

(6) Members shall be compensated in accordance with RCW 43.03.250 and in addition shall be reimbursed for travel expenses incurred while engaged in the business of the commission as provided in RCW 43.03.050 and 43.03.060. The compensation provided pursuant to this section shall not be considered salary for purposes of the provisions of any retirement system created pursuant to the general laws of this state.

Supreme Court, U.S.
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(2)

NO. 03-801

IN THE SUPREME COURT OF THE UNITED STATES

SAM S. REED, SECRETARY OF STATE
OF THE STATE OF WASHINGTON,

Petitioner,

v.

DEMOCRATIC PARTY OF WASHINGTON
STATE; REPUBLICAN STATE COMMITTEE OF
WASHINGTON; LIBERTARIAN PARTY OF
WASHINGTON STATE, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE BRIEF OF REPUBLICAN STATE COMMITTEE OF WASHINGTON

JOHN J. WHITE, JR.
Counsel of Record

Kevin B. Hansen
LIVENGOOD, FITZGERALD
& ALSKOG, PLLC
620 Kirkland Way, Suite 200
Kirkland, WA 98083-0908
(425) 822-9281

QUESTION PRESENTED

Whether Washington's blanket primary and candidate unilateral self-designation of party affiliation system forces the Republican Party to associate with non-affiliated voters and office-seekers in the process of choosing its nominees for partisan office, contravening the Republican Party's right under the First Amendment to associational and expressive freedom, under *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

R.C.W. § 29.15.010

"A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration and affidavit of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) A place for the candidate to indicate a party designation, if applicable;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under R.C.W. 29.15.050;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in R.C.W. 29.15.050.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process."

STATEMENT

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court invalidated California's blanket primary election system as unconstitutionally burdening political parties' First Amendment rights of association and expression. This case turns on whether the First Amendment principles of *Jones* apply with equal force to Washington's blanket primary.

Washington's primary is materially indistinguishable from California's, and its effects served as the basis for this Court concluding that the California primary violated the First Amendment. Washington attempts to distinguish its system from California's by asserting that the blanket primary is not used to nominate party candidates, but rather candidates of the "general electorate." This assertion is proved false by Washington's statutes and its Attorney General's consistent interpretation of the blanket primary from the time the primary was adopted in 1935 until well after litigation commenced in this case.

REASONS FOR DENYING THE PETITION

Washington shows no reason this Court should devote scarce judicial resources to review the Court of Appeals decision. The Ninth Circuit struck down Washington's blanket primary based on this Court's clear statement of First Amendment principles in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). In *Jones*, this Court relied on Washington's experience with its blanket primary in concluding that California's blanket primary invaded the First Amendment rights of political parties and their members. Washington's assertion that

its primary is constitutionally distinguishable is contradicted by the statute itself, the State's contentions as an *amicus curiae* in *Jones*, its stipulations and representations in this case, and its consistent position since the blanket primary was adopted in 1935.

From the outset of this case, Washington recognized that this Court's decision in *Jones* applied to its primary election system.[1] In stipulating to the entry of a preliminary injunction, Washington admitted that "forcing the Parties to select their nominees in the blanket primary called for by existing election statutes violates each Party's First Amendment rights of association and causes the Party and its members irreparable injury." (ER 0070-71) The State further stipulated that an "Authorized Voter" in the Republican primary was one whose "participation in a primary is consistent with the political party's right to determine those who will participate in selecting its nominees, as articulated in" *Jones,* and that "[a] Party's definition remains in effect until changed by the Party." (ER 0069)

The Republican Party adopted rules establishing qualifications for candidates for nomination and primary election voters. (ER 1244-49) After stipulating to the preliminary injunction, however, the State failed to

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[1] Washington has previously represented to this Court that *Jones* had application to the blanket primary generally, which served as the catalyst for Washington's status as an *amicus curiae.* In its *amicus* brief, the State asserted, "The freedom of citizens of Washington . . . to embrace the blanket primary . . . clearly is threatened by the Political Parties' challenge to California's blanket primary." Brief of the States of Washington and Alaska as Amici Curiae in Support of Respondents, LEXIS, *1999 U.S. Briefs 401,* *2.

correct its facially invalid statute. The State chose to burden the Republican Party with three more primary elections under an admittedly unconstitutional system, because it viewed the remedy as unpalatable.[2] When the political parties moved for summary judgment and a permanent injunction in March, 2001, the State still conceded that it could not run a constitutional election under the blanket primary: "This case is . . . not about the constitutionality of the blanket primary; it is about the appropriate remedy." (ER 198, 0392-99)

In the decision below, the Ninth Circuit applied directly controlling precedent of this Court, holding that Washington's primary violated political parties' First Amendment right of association, as did California's blanket primary. *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1203-1206 (9th Cir. 2003). At best, the State's petition for a writ of *certiorari* amounts to an invitation for this Court to reconsider not only its decision in *Jones*, but also the long line of cases upholding the right of political parties to determine whether nonmembers may participate in the selection of party nominees for public office. *See, e.g., Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

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[2] After *Jones* was decided, Washington's attorney general, Christine O. Gregoire, wrote to Washington's governor and secretary of state "regarding the potential for legal challenges" concerning the upcoming primary elections. (ER 0025) Ms. Gregoire opined that *Jones* "does not prohibit the blanket primary unless the political parties choose to *nominate* their candidates by other means." (ER 0026) (emphasis added)

A. The Blanket Primary Systems of Washington and California Are Indistinguishable.

1. Washington Misstates the Nature of Its Primary Election Statutes In Asserting That The Blanket Primary Does Not Designate Party Nominees.

Washington's entire petition is premised on its contention that unlike California, its blanket primary does not "designate party 'nominees' or 'standard bearers' but [rather] winnow[s] the field of candidates who will appear on the general election ballot." Petition at 12. The assertion is false, contradicted by the language of the Washington statutes themselves and the Washington Attorney General's longstanding interpretation of the blanket primary statute.

Washington attempts to buttress its position by claiming that the concept of party "membership" has no relevance to its blanket primary, because the candidates selected in the primary are not party nominees. The district court in *Jones* adopted a similar tack, stating that, in California, "the term 'party member' as applied to registered voters is something of a misnomer." *California Democratic Party v. Jones*, 984 F. Supp. 1288, 1296 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000). Even without addressing the inaccuracy of Washington's contention, the Ninth Circuit observed that the State's argument that the blanket primary prevents a party from picking its nominees "is the problem with the system, not a defense of it." *Reed*, 343 F.3d at 1204.

On the day this case began, the State stipulated that its election statutes required the Republican Party "to select [its] *nominees* through a public primary conducted by the Secretary of State." (ER 0070) (emphasis added) Opposing the Party's motion for a permanent injunction, Washington advised the district court that "a state cannot constitutionally compel political parties to accept a system known as the 'blanket primary' as the method for selecting *partisan nominees*." (ER 0198) (emphasis added) Only later did Washington "discover" that its primary did not nominate the Party's candidates.

a. Washington's primary election statutes unequivocally state that party candidates are nominated through the blanket primary.

Washington statutes make clear that the blanket primary nominates the Republican candidate who will appear on the general election ballot. Only a single candidate for a particular partisan office may bear the Republican name at the general election. *See* R.C.W. 29.30.095. According to R.C.W. 29.18.150, "[s]hould a place on the *ticket* of a major political party be vacant because no person has filed *for nomination as the candidate of that major political party*, . . . the . . . central committee of the . . . political party may select and certify a candidate to fill the vacancy." (emphasis added)

Similarly, R.C.W. 29.18.160 makes express reference to a "*nominee* of a major or minor political party" when filling vacancies occasioned by death or disqualification prior to the election. (emphasis added) The entire ballot access system under Washington election law rests on candidates being party nominees. A

"major political party" is defined as "a political party of which at least one *nominee* for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year." R.C.W. 29.01.090 (emphasis added).

Under R.C.W. 29.30.095, "[t]he name of a candidate for a partisan office for which a primary was conducted shall not be printed on the ballot for that office at the subsequent general election unless the candidate receives a number of votes equal to at least one percent of the total number cast for all candidates for that position sought and a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary." There is no question that Washington's blanket primary determined the identity of the Republican nominee in the general election.

The State relies on another part of its statutory scheme, R.C.W. 29.15.010, also declared unconstitutional by the Ninth Circuit, to contrast Washington's and California's blanket primaries. The filing statute, which allows candidates to self-designate their political party, was expressly challenged by the Republican Party as an unconstitutional infringement on the right of association. In denying the Republican Party's request for a permanent injunction, the district court noted that the Republicans sought to enjoin the State from, *inter alia*, "[a]llowing any person other than the authorized candidate of the Republican party to appear on the ballot." (ER 0394) The Ninth Circuit directed that the Party receive its injunctive relief. *Reed*, 343 F.3d at 1207. Washington may not rely on one statutory provision that the Ninth

Circuit held violates the First Amendment (and which it does not challenge here) to justify its invasion of First Amendment rights through its blanket primary.

b. Washington's Attorney General has historically taken the position that the blanket primary is the process by which political parties nominate their candidates.

Two State attorney general opinions further refute Washington's argument that its primary does not select Republican Party nominees. The first, in 1935, immediately following adoption of the blanket primary, was unequivocal in holding that the primary produced party nominees. The Attorney General, discussing the impact of the blanket primary on other election laws, stated that (1) the candidate receiving the most votes among candidates of a particular political party "will be the *nominee of such party*"; and (2) the blanket primary "simply provides a method by which voters can nominate candidates to run as the *nominees of the various parties* at the general election." (ER 1199) (emphasis added)

In the second opinion, in 1956, the Attorney General described three methods "by which a candidate seeking the *party nomination* for an office in a partisan primary may secure such nomination," and utilized the Secretary of State's interpretation of how a "write-in" candidate could "become a *party nominee* for a given partisan office." (ER 1205) (emphasis added) Washington offers no explanation for its abandonment of this longstanding interpretation of its statutes. Nor does the State offer even now an explanation why this Court

should reject the State's contemporaneous construction,[3] consistently followed, in favor of a contrary interpretation adopted mid-litigation.[4]

2. Washington's Experience With the Blanket Primary Was the Basis for this Court's Reversal of the Ninth Circuit in *Jones*.

Much of the evidence presented in this case was also addressed in *Jones*, and underlies this Court's conclusion that the blanket primary harms political parties' First Amendment rights.[5] The district court in *Jones* directly relied on Washington's primary to uphold the California system, using Washington's "half century of experience with a blanket primary" as evidence of what is "likely to occur in California." *Jones*, 984 F. Supp. at 1297 & 1299. The district court viewed the "harms" and

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[3] Even in the initial decision upholding the blanket primary, *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936), the Washington Supreme Court recognized that party nominees are selected in the blanket primary: "[Washington's direct primary law] still stands except as amended or repealed by the 1935 act. . . . *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728 [1908] . . . may well be read in connection with what is said here." 186 Wash. at 605. *State ex rel. Zent* repeatedly refers to candidates selected to advance to the general election as nominees of the parties.

[4] If the State's contention were correct, its statutes would be constitutionally defective, as a minor political party achieving major party status would thereby forfeit its right to define its message to voters. *Compare* R.C.W. 29.24.020 (Petition, App. at 94a) *and* R.C.W. 29.18.200 (Petition, App. at 92a).

[5] Washington's *amicus* brief in *Jones* even represents that the evidence supporting the district court's decision "was drawn from the experience of Washington." LEXIS, *1999 U.S. Briefs 401*, *3.

"benefits" of California's blanket primary through the eyes of Professor David Olson of the University of Washington, whose report was also heavily relied upon by the district court in this case. *Compare Jones*, 984 F. Supp. at 1297-98 & n.24, 1299 & n.27, 1300 & n.29 *with* Petition, App. at 58a, 63a, 66a-67a, & 74a-79a.

In *Jones*, Professor Olson testified that the vast majority of Washington "voters cross over at least once." 984 F. Supp. at 1298 n.24. In this case, he stated "that one-quarter to one-third of voters cast their primary votes within one party column only." (ER 0649) In *Jones*, this Court noted Olson's testimony that "only 25 to 33 percent of all Washington voters limit themselves to candidates of one party throughout the ballot" and concluded that under California's primary, "the prospect of having a party's nominee determined by adherents of an opposing party is far from remote – indeed, it is a clear and present danger." 530 U.S. at 578. The State offers no explanation why cross-over voting by two-thirds to three-quarters of Washington's electorate poses any less "danger" today.[6] A 2000 survey found that only 31% of Washington voters planned to vote a straight Party ticket in the primary. (ER 0390)

California's blanket primary was "the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders." 984 F. Supp. at 1293. Similarly, Washington argues that its blanket primary was conducted "by and for the general electorate." Petition at

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[6] Professor Olson admitted that Washington cross-over voting changed the winner of a party nomination, resulting in Washington having a different governor. (ER 0634:20-24) The State offers no justification for continuing this clear and present danger.

15. Professor Olson admitted that allowing the "general electorate" to participate has produced candidates in Washington who differed philosophically from those chosen by party voters. (ER 0648, 1191) This Court agreed that the "substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from the party faithful," 530 U.S. at 578, and concluded that this invades protected First Amendment rights, even if motivated by "benevolent" intentions. 530 U.S. at 579. Professor Olson testified in this case that Washington's primary dilutes the votes of party identifiers (which was also "likely to occur in California," 984 F. Supp. at 1299), but opined that "it is simply the price to pay for permitting voters to winnow the field of candidates." (ER 1010-1011) This Court recognized that this substantial influx of non-party voters harms the Party's right to select the leaders who will represent it at the general election. 530 U.S. at 578-580.

Washington's primary produces the same unconstitutional message modification as California's. Professor Olson reported that "[b]ecause candidates under the blanket primary have to appeal not only to their own party identifiers, but also to independents and opposite party identifiers, candidates have incentives to craft and offer messages that appeal to the median voter." (ER 0650) This too, *Jones* concluded, is an unconstitutional burden, because candidates will have "prevailed by taking somewhat different positions – and . . . will continue to take somewhat different positions in order to be *re*nominated." 530 U.S. at 580 (emphasis in original).

B. *Reed* Is Merely the Latest Case Following this Court's Rulings that Political Parties, Not the State, Define the Scope of Their Association and Who May Select Their Nominees.

The Court of Appeals decision follows a long line of Supreme Court cases upholding the right of political parties to determine whether nonmembers may participate in the selection of party nominees for public office. *See, e.g., Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989); *Jones*, 530 U.S. at 575 ("Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'") (quoting *Eu*, 489 U.S. at 224).

Unaffiliated and rival party voters are not free to cross party lines to support a particular candidate at the expense of the associational right of political party adherents to select their standard bearer. A "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." 530 U.S. at 583 (quoting *Tashjian*, 479 U.S. at 215-216, n.6). As in California, a "voter's desire to participate does not become more weighty simply because the State [of Washington] supports it." 530 U.S. at 583-84.

In *Jones*, this Court noted that California rested its "defense of the blanket primary upon the proposition that

primaries play an integral role in citizens' selection of public officials. . . . [The blanket primary], respondents conclude, is simply a rather pedestrian example of a State's regulating its system of elections." 530 U.S. at 572. Similarly, Washington contends that because "[t]he primary is not conducted by, for, or through the political parties, but by and for the general electorate," it may force the Party to allow outsiders to define its message and nominees. Petition at 15.

This Court rejected that contention, stating, "[W]hatever the strength of the state interests supporting the open primary itself, they could not justify [a] 'substantial intrusion into the associational freedom of members of the National Party.'" 530 U.S. at 576 (quoting *La Follette*, 450 U.S. at 126). California's blanket primary, Wisconsin's open primary, and Washington's blanket primary all constitute a "state-imposed burden," which is the "intrusion by those with adverse political principles upon the selection of the party's nominee." 530 U.S. at 576 n.7 (internal quotation marks omitted).

Where Democratic Party rules prohibited the participation of nonaffiliated voters in the nomination process for its presidential candidate, and Wisconsin sought to compel the Democratic Party to seat delegates chosen through an open primary, in which voters did not declare their party affiliation, the Party's rules controlled over the inconsistent state statute: "It is for the National Party – and not the Wisconsin Legislature or any court – to determine the appropriate standards for participation in the Party's candidate selection process." *La Follette*, 450 U.S. at 124. Where a Republican Party rule allowed

independent voters to vote in Republican primaries, and Connecticut required voters in any party primary to be registered members of that party, the conflict was resolved in favor of the Party rule: "The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Tashjian*, 479 U.S. at 224.

The principles underlying both *La Follette* and *Tashjian* were explicitly adopted by this Court in *Jones*. The selection of a standard bearer by a political party is fundamental to its existence, and a state may not substitute its judgment for that of the political party in determining whether the party's message is advanced by the participation of nonmembers, or not. *See* 530 U.S. at 581-82.

C. Washington State Cases that Directly Conflict with This Court's Constitutional Rulings Are Entitled to No Deference and Provide No Basis for a Writ of Certiorari.

Washington seeks review in part based on an asserted conflict between state supreme court decisions, not only with the Ninth Circuit *Reed* decision, but with this Court's decision in *Jones*. In *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980), the Washington Supreme Court held that forcing political parties to allow unaffiliated voters to select the parties' nominees was not a substantial burden on their associational rights. This Court held that there is "no heavier burden on a political party's associational freedom" than such forced association. *Jones*, 530 U.S. at 582. Washington offers no authority for its assertion that *Heavey* is "entitled to

considerable deference" by this Court. Petition at 19, n.17. It is a fundamental principle of constitutional law that the conflict between *Jones* and *Heavey* must be resolved in favor of this Court's constitutional interpretation. *See* U.S. CONST. art. VI, cl. 2.

It should be noted that *Heavey* rejected the challenge to Washington's blanket primary "for the same reason" that the Wisconsin Supreme Court rejected a challenge to Wisconsin's open presidential preference primary in *State ex rel. La Follette v. Democratic Party*, 93 Wis. 2d 473, 287 N.W.2d 519 (1980). *See Heavey*, 93 Wn.2d at 706 (Horowitz, J., concurring). Similar to *Heavey*, Wisconsin's Supreme Court found no substantial burden on the party's associational rights, and found a compelling state interest in "preserv[ing] the overall integrity of the electoral process by encouraging increased voter participation in the political process and by providing secrecy of the ballot." *La Follette*, 287 N.W.2d at 536; *compare with Heavey*, 93 Wn.2d at 705 (finding compelling state interests in "allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary."). This Court's *La Follette* decision, reversing the Wisconsin Supreme Court, *see* 450 U.S. at 125 ("the interests advanced by the State do not justify its substantial intrusion into the associational freedom of members of the National Party"), applies equally to *Heavey*, rendering it questionable authority, at best.[7]

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[7] Washington's court has not passed on a primary election case since the *La Follette – Tashjian – Jones* line of cases, and there is no reason to assume that it would continue to adhere to its previous decision in light of later First Amendment developments.

Like Washington, Alaska previously justified its blanket primary as "ensuring that officers elected are representative of a broad cross-section of the electorate, rather than accountable to the narrower interests which may control a party organization." *O'Callaghan v. State*, 914 P.2d 1250, 1262 (Alaska 1996). Prior to the *Jones* decision, the Alaska Supreme Court followed Washington in finding its blanket primary to be constitutional.[8] *See id.*

In its petition, Washington notes the 1996 *O'Callaghan* decision, stating that "[t]he Alaska Supreme Court also upheld the form of blanket primary used in that state for many years." Petition at 7, n.5. The State fails to explicitly mention, however, that within two months of the *Jones* decision, the Alaska Supreme Court reversed itself in light of *Jones*: "Having reviewed *Jones*, we find no constitutionally significant differences between Alaska's primary election law and the California law declared unconstitutional in *Jones*. Nor do we find any principled basis for concluding that Alaska's blanket primary election statute remain constitutional in light of *Jones*." *O'Callaghan v. State*, 6 P.3d 728, 730 (Alaska 2000). Given the conflict between its earlier decision and the *Jones* decision, the Alaska court recognized that the Supremacy Clause required it to reverse the 1996 decision. *See id.*

As a final basis for seeking review, Washington contends that decisions of this Court conflict on the issue of its blanket primary. However, the State misrepresents the issue and this Court's decision in *Munro v. Socialist*

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[8] Washington and Alaska filed a joint *amicus curiae* brief in *Jones*.

Workers Party, 479 U.S. 189 (1986). *Munro* and *Jones* require no reconciliation, as they involve entirely separate and distinct issues. Washington "requires that a minor-party candidate for partisan office receive at least 1% of all votes cast for that office in the primary election before the candidate's name will be placed on the general election ballot." *Id.* at 190. The issue in *Munro* was not the blanket primary. The question was "whether [the 1% support requirement for minor party nominees to obtain access to the general election ballot] for statewide offices, violates the First and Fourteenth Amendments to the United States Constitution." *Id.* at 190-91. Whether a state may require a political party nominee to meet a minimal threshold of support among the voting public to warrant access to the general election ballot is an entirely different question from whether a state may force a political party to allow unaffiliated voters and members of competing political parties to select the party's representative in the general election. In no way can *Munro* be read as this Court's tacit approval of Washington's blanket primary.

CONCLUSION

This Court has already provided clear, consistent guidance on the limits of state power to compel political parties to include unaffiliated voters in selecting their nominees. A further opinion on this issue would provide no greater clarity. The Ninth Circuit clearly understood this Court's mandate, remanding the case "for entry of summary judgment, declaratory judgment, and an injunction in favor of the [political parties]." *Reed*, 343 F.3d at 1207. If the State seeks clarity for its officials in implementing the *Reed* decision, Petition at 18, n.15, it should look to the orders for summary judgment and

permanent injunction submitted by the political parties, not a confirming opinion from this Court.

RESPECTFULLY SUBMITTED this 30th day of December, 2003.

JOHN J. WHITE, JR.
Counsel of Record

KEVIN B. HANSEN
Livengood, Fitzgerald & Alskog
620 Kirkland Way, Suite 200
P.O. Box 908
Kirkland, WA 98083-0908
425-822-9281

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NO. 03-801

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON,

Petitioner,

v.

DEMOCRATIC PARTY OF WASHINGTON STATE; REPUBLICAN STATE COMMITTEE OF WASHINGTON; LIBERTARIAN PARTY OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General

James K. Pharris
Sr. Assistant Attorney General
Counsel of Record

Jeffrey T. Even
William G. Clark
Assistant Attorneys General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

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REPLY TO BRIEFS IN OPPOSITION TO PETITION[1]

1. There Is A Conflict Between The Ninth Circuit Court Of Appeals Decision And The Decisions Of The Washington State Supreme Court

As the petition points out at pages 7-8, the decision of the Ninth Circuit in this case invalidates Washington's blanket primary, an election system which has been in place since 1935 and has twice been upheld by the State's highest court. *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936); *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980). In response, the Democratic Party suggests that the Washington state court decisions are "stale" and the Republican Party denigrates the state court decisions as "entitled to no deference". Dem. Party Resp. at 19-21; Rep. Party Resp. at 15-18.

Anderson and *Heavey* are thoughtful, considered decisions in which the State's highest court weighed the interests of the political parties, of individual party officers, and of the State, and upheld Washington's primary, rejecting a variety of challenges based on both the state and federal constitutions. *Anderson* is not based, as the Democratic Party suggests on page 19 of their brief,

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[1] Two of the adverse parties in this case, the Democratic Party of Washington and the Republican State Committee of Washington, filed briefs in opposition to the Washington Secretary of State's petition. This is a combined response to both briefs, which will be referred to, respectively, as the "Democratic Party Response" and the "Republican Party Response".

on the notion that the Constitution "provides no First Amendment Protection to political parties". Indeed, the decision notes that Washington's statute "makes no attempt to control the inherent power of a political party to adopt principles and to require its members, and especially its officials, to give adherence thereto". *Anderson*, 186 Wash. at 608. The court concluded, however, that in the context of Washington's election system, the parties had shown no constitutional interest overcoming the State's interest in determining how candidates should qualify for the general election ballot. *Id.* at 604-06.

If the Washington Supreme Court had the opportunity to reconsider these decisions in light of *California Democratic Party v. Jones*, 530 U.S. 567 (2000), or other recent decision of this Court, it might modify or reverse its previous decisions, or it might find a basis for distinguishing Washington's primary from the California primary which was the subject of *California Democratic Party*. The state courts have not had that opportunity, however. Only this Court has the authority to resolve the conflict between the state cases and the circuit court decision in this case.

2. *California Democratic Party* Does Not Resolve This Conflict Because Washington Does Not Use Its Primary To Choose Political Party Standard Bearers

The petition sets forth in some detail the distinction between the California election invalidated in *California Democratic Party*, in which political party candidates or "standard bearers" for various offices were chosen in the primary, and Washington's election system, which merely

winnows the field of candidates to make the general election ballot more manageable. Pet. at 11-13.

The political parties assert that Washington's system, like California's, is actually a party nomination system. Dem. Party Resp. at 11-13; Rep. Party Resp. at 8-10. They quote a handful of state statutes in which the word "nominee" appears in close proximity to "party" but misunderstand the context of those references. As noted in the petition, Washington's election system seeks to maximize the choices available to state voters in the primary, without yielding the benefits of vigorous party competition in the general election. To these ends, state law (1) allows candidates to state their party affiliation; (2) takes party affiliation into account in determining who advances to the general election ballot; (3) treats minor parties more leniently in order to increase their chance of participating in the general election; and (4) gives political party organizations a limited role in filling vacancies on the ballot. The purpose of these is to retain the benefits of a true partisan election without, however, turning the primary into a process for nominating "political party" candidates. The candidates are nominated by and for the general electorate.

The political parties actually appear to be arguing that *any* process for nominating candidates for partisan office is a "party nomination process" and that the political parties have a constitutional right to determine how the nomination process will be conducted. Nothing in *California Democratic Party* suggests that a state must pay such a high

price merely by defining some offices as "partisan" in nature.[2]

3. Washington's Blanket Primary Was Not Before This Court In *California Democratic Party*

Both political parties suggest that Washington's blanket primary has already been invalidated by this Court because extensive evidence about the Washington primary was introduced in the California litigation and was considered in reaching a decision in *California Democratic Party*. Dem. Party Resp. at 4-6; Rep. Party Resp. at 10-13. These suggestions are based, again, on the notion that Washington's election system is indistinguishable from California's.

The point of the petition is to show that Washington's election system is, in fact, quite different from California's, thus changing the context in which the blanket primary is used. This Court has never had the opportunity to explore these distinctions, and Washington has never had the

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[2] The political parties also cite certain state court decisions and attorney general opinions using the phrase "nominee of a party" or something similar. Since Washington's system produces, in each general election, no more than one candidate for a given office affiliated with a particular party, it is inevitable that this candidate will loosely be referred to as that party's "candidate" for an office. Before *California Democratic Party* was decided in 2000, no one had need to distinguish carefully between the candidates who appear on Washington ballots and the true "party nominees" produced by the systems of certain other states. The Court should base its analysis on the true nature of Washington's election system, not on loose historical labels.

opportunity to assert them. It is interesting that the political parties would refer the Court to the record in the California case, when they in fact introduced no competent evidence in the present case showing how Washington's blanket primary actually harms their constitutional interests.[3]

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari in this matter should be granted.

RESPECTFULLY SUBMITTED.

CHRISTINE O. GREGOIRE
Attorney General

James K. Pharris
Sr. Assistant Attorney General
Counsel of Record

Jeffrey T. Even
William G. Clark
Assistant Attorneys General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

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[3] The Democratic Party Response at pages 8-10 also asserts that Washington has "conceded" that its blanket primary is unconstitutional, based on language in an agreed temporary injunction order entered when the case was filed. This argument is inaccurate and irrelevant. Washington has vigorously defended the blanket primary throughout this case, and with success at the trial court level. Even if the criticism were accurate, the Court would not be bound by a concession on a purely legal issue. See *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 622 (1996), and cases cited therein.